ON THE BEAM

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FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

Volume 12, Issue 2, May 2018

Where Is Public Trust?

By Schon G Condon RFD

As we, as a society, continually move forward we are increasingly being confronted with images, stories, news and examples of situations where the ordinary man/woman in the street beggars for an understanding of – How could this have occurred? Is this really real or are we just in some big game box and one day we will wake up and be confronted by proper reality… for that matter what actually is proper reality?

Paper and news reports are awash with the continuing concern that those traditional places where trust could be levelled are slowly but surely being whittled away and much real confidence is going with that. The jokes always started with "you can never trust a politician!" but would fall back to those other professions that made up for the "political misgivings" that have become (regrettably) so much the norm. Dad Rudd's speech upon entering Parliament in the 1930's Australian movie "On Our Selection" was inspiring in its intended genuineness, but today it is very much of a time long past.

Years ago I remember chatting with a former Station Master from Windsor who related of days when the local Bank Managers, the Station Master, the Clerk of the Court, Sergeant of Police and others of note would be found in a particular pub on a Friday afternoon available for counsel and guidance to all and sundry. Yes it was almost a country town, but the same could be said of other commercial centres around Sydney. On the other hand however it was actually not really that long ago, certainly within my lifetime. All these people carried significant public trust, be it what they did, their role or their ability to proffer good advice.

Over time this trust has been removed, chipped away so that they were no longer able to provide any real counsel, and people were left with some personal adviser, accountant, solicitor, physician, and chemist, maybe. Around this major institutions began to push to become the icons of trust that all could rely on. 'Brands' became the key and it was here that mere mortals were expected to place all of their trust. They were beyond individuals, they had strength, they had knowledge, and most of all they had power.

Governments began to increasingly cajole them because they had three very important elements - money, influence and power. It became native that these organisations would do exactly the same in the reverse, because governments could give them more. Each would feed off each other.

Public trust is certainly at its lowest point in a very, very long time; but it's not yet dead. Regrettably it certainly appears to be continuing to get worse. A little like spreading skin cancers, a perception that they are not necessarily today's problem, but left unattended they can and will be terminal.

Much of the guidance that is being written by various experts at the moment is all around the empirical idea that change, followed by commitment, followed by convincing, followed by good marketing will put the past into the dark ages. I fear that we may well be beyond this. Society is going to look increasingly at holistic responses, not just that the protagonists have changed, but that the system has looked at how it happened and why it happened and that changes are also made so that the system begins to self-correct as it moves forward so things like this don't happen again.

In the alternate though, if you follow George Orwell's theories then as large body of the 'proletariat' the issue of public trust is irrelevant to them, isn't it? The public is in essence of no real interest or is it relevance; I'm not sure! I'd truly like to think that we are far more educated and savvy than that now and that that will not be the ultimate conclusion.

I am confident however, that the old 'public trust' is going to take some further real beatings before we are truly on a road to recovery; and that it will be those organisations that actually and genuinely achieve this that will be the keys to the future.

Enjoy the read.

Gaol Time - Fraud Convictions

By Gavin King

Recently the Supreme Court of NSW handed down what is, to date, the longest sentence for a tax evasion scheme. Proving that eventually tax evasion will catch up with those individuals and the punishment will be severe.

The fraud was perpetrated by two individuals one of whom was an executive of one of the major accounting firms in Australia, the other individual was claiming deductions for depreciation expenses, which it was ultimately found was not able to do. Both individuals were directors of the company.

The company was allegedly purchasing intellectual property from an overseas entity, funded with overseas financiers and valued by an overseas valuer. As part of the proceedings it was determined that all of these overseas entities were one that was controlled by the directors of the Australian Company.

Based upon the "valuations" and "finance" received the company would then claim depreciation and expenses relating to that purchase that would result in the company earning less income and accordingly paying less tax on its earnings. Over the period of three years the two individuals set up numerous false identities and companies with which to continue the fraud. In doing this it has been estimated that the company reduced its taxable income by approximately $450 million and that the two individuals involved received $63 million.

These prosecutions are the result of investigations which have been undertaken by the Serious Financial Crime Taskforce ("SFCT") which was setup at the end of project Wickenby. The SFCT is a taskforce that has members from a number of different commonwealth agencies, including ATO, AFP, AUSTRAC, ASIC Australian Border Force and the CDPP. Based on the agencies alone it can be seen that the taskforce will have at its disposal a lot of information from the respective agencies on which to base its decisions or who to undertake an audit.

During the period 1 July 2017 to 30 December 2017 the SFCT has prosecuted a number of advisors including tax agents, company directors and a partner of an accounting firm. It is apparent that the SFCT is willing to investigate any instances of continuing fraud that it sees. The instance of the tax agent was in relation to obtaining government grants that they were not entitled to and was sentenced to 2.5 years gaol. The company director related to a director submitting false BAS returns and was given 3 years gaol and a reparation order of $134,000 and finally the accounting firm partner was using family members and clients identities, i.e. the individual names or the company names to obtain fraudulent tax refund payments and the person received in excess of $2 million dollars. In this instance the person was sentenced to 8 years in goal and a reparations order of $884,000.

These few examples of prosecution by the SCFT should make any Accountants and Lawyers aware that if they are engaging with clients and giving advice on how to prepare or are engaging in tax evasion and fraudulent activities they may also be on the receiving end of a substantial period of gaol time.

Setting Aside A Winding Up Order In The Absense Of A Party?

By Adam Chen

When a company does not attend its winding up hearing, in the majority of cases, the company evidently gets wound up without any opposing parties. The question is whether the winding up order can be set aside.

Setting aside an order:
Under Rule 39.05(a) of the Federal Court Rules 2011 (Cth.) and rule 36.16(2)(b) of the Uniform Civil Procedure Rules 2005 (NSW) the Federal Court and Supreme Court have the power to vary or set aside orders made in the absence of a party.

In George Ward Steel Pty Ltd v Kizkot Pty Ltd (1989) 15 ACLR 464, the Supreme Court held that the court should exercise that power to set aside a winding up order if:

- The Order is made in the absence of the defendant company;
- That the application to set aside the Order is brought promptly;
- A good explanation was provided for the non-appearance;
- Notice is given to the Liquidator, to the person who sought to have the company wound up and to any creditor who appeared at the hearing;
- There is consent, or as a minimum no opposition, to the setting aside; and
- The liquidator has not found anything in his or her investigations showing reason for the company to be stopped from trading.

The above principles have been used in various cases such as DCT v JJ & Son Pty Ltd [2013] FCA 556; Twin Peaks Leisure Pty Ltd (in liq) v Workers Compensation Nominal Insurer [2012] FCA 1501 and Sadiqi, in the matter of Cook Islands Christian Church of Australia Limited (in liq) v Cook Islands Christian Church of Australia Limited (in liq) [2016] FCA 786 in guiding the Court's exercise of power to set aside a winding up order, made in the absence of the company.

In relation to the above principles, what explanations for non-appearance would be deemed acceptable?

Acceptable explanations
Examples of accepted explanations for non-appearance include:

1. The company being deprived of an opportunity to appear due to the conduct of a person who has been responsible for 'substantial fraud' upon the company, which was used in the matter of DCT v JJ & Son Pty Ltd [2013] FCA 556.

2. The registered office of the company was its accountant's office, who did not bring the winding up application to the attention of the relevant officers of the company, which was used in the matter of Twin Peaks Leisure Pty Ltd (in liq) v Workers Compensation Nominal Insurer [2012] FCA 1501.

Unacceptable excuses

Examples of rejected explanations for non-appearance include:

1. Directors claiming that they did not appear because they were out of the country, but waited five months after returning to attempt to have the winding up set aside, which was used in the matter of Gyrro Pty Ltd v DCT [2009] FCA 1477.

2. The winding up application came to the attention of the proper officer, but the person to whom he delegated responsibility failed to act upon it, which was used in the matter of Satz v ACN 069 808 957 Pty Ltd [2010] NSWSC 365

What about the Liquidator?

The Liquidator has a right to full indemnity for the costs, charges and expenses properly incurred. This right does not dissolve simply because the winding up order is set aside. In most cases, the Directors of the company will arrange for the Liquidator (and petitioning creditor) to be paid in full to ensure there is a consent or at least no party to oppose the setting aside.

Ipso Facto To Come Into Effect Soon

By: Muna Laloo

On 28 March 2017, the Australian Federal Government released draft legislation in relation to two major reforms intended to encourage turnaround, restructuring and business rescue. The main focus in this article will be on the operation of ipso facto clauses.

These clauses allow one party to a contract to terminate the agreement upon the occurrence of a specific event, often linked to insolvency and more particularly a formal insolvency appointment. The type of termination can occur regardless of the counterparty's continued performance of its obligations under the contract, which can have a devastating impact on the business .These types of clauses are regularly found in leases, supply agreements, licences etc.

It is clear that clauses such as this can make it near to impossible for the appointed insolvency practitioner to achieve a successful restructuring of the troubled business.

The draft legislation introduces two new provisions (sections 415D and 451E) that relate to ipso facto clauses triggered by schemes of arrangement and administration, respectively. The Ipso Facto provisions are set to commence on 1 July 2018 (or earlier by proclamation).

After a campaign that ARITA first launched around a dozen years ago, safe harbour and 'ipso facto' reforms passed the Senate on 11 September 2017.

The proposed reforms will see a moratorium on 'ipso facto' provisions triggered by the company's financial position and extends to:

- Schemes for the purposes of avoiding being wound up in insolvency
- Managing controllers appointed to the whole or substantially the whole of the company's property ('managing controller'), and
- Voluntary administrations.

These provisions would override "insolvency related terms", that is, term where the customer's administration or voluntary arrangement automatically terminates the supply or contract; a term where the customer's insolvency triggers the right to terminate the supply.

Some of the key points to be aware of in relation to the draft legislation are:

- The new law will only apply to contracts, agreements or arrangements entered into after the commencement of the new law.
- The 'ipso facto' right will remain unenforceable against a company after the end of the stay:
  - For events that occurred before the end of the stay period, or
  - Due to the company having been subject to a scheme, voluntary administration or having had a managing controller appointed.
- The right to terminate or amend an agreement remains if the breach occurs for any other reason, such as non-payment or non-performance.
- The stay can be waived in writing by the appointed insolvency practitioner.
- A lender to the company cannot be forced to advance new money or credit under an existing agreement during the period of the stay.
- The court can order that the stay not apply in relation to a particular contract.
- The court can grant extensions of the period of the stay.
- The stay will not extend to contracts entered into after the company enters into the scheme, voluntary administration or has a managing controller appointed.
- The stay will apply to schemes for disclosing entities from the time that the company announces that it will be making an application under s 411. The company will then have three months or longer, if provided by the court, to actually make the application.
- If a replacement managing controller is appointed over the whole, or substantially the whole, of the company's property there is continuity in the period of protection.
- A stay on a right during a voluntary administration will

extend into a subsequent winding up, but a liquidation commenced without a preceding voluntary administration will not have the benefit of 'ipso facto' protection.

- A secured creditor with security over the whole or the substantially the whole of the company's property maintains its right to appoint a controller under s 436C where a voluntary administrator has been appointed, via amendments to s 441A.

Implementing the 'Ipso Facto' provisions may benefit the business in distress. This will result in termination of the contract between the supplier and the provider of services. Any eventual sale of the business being for a lesser value may result in a lesser return to the creditors in the administration.

Extension of Time To Bring Voidable Transaction Proceedings

By Padmini Saheb

Liquidators may obtain an extension to the time for them to bring Voidable Transaction Proceedings under Section 588FF(1) of the Corporations Act (Extension Order). Section 588FF(1) allows Liquidators to apply to the Court for Orders in respect of Voidable Transactions, such as the return of money paid by the Company in the months prior to its collapse. Section 588FF(3)(a) puts a time limit on such applications. Liquidators can only apply within 3 years after the day the Winding Up is taken to have begun or within 12 months after the first appointment of Liquidators (whichever date is later).

However, Liquidators may apply to the Court to extend time to bring Voidable Transaction Proceedings. The extension of time application must also be filed within the same time limits set out above. Section 588FF(3)(b) permits Liquidators to make an application during the above time period for an extension of that time period.

In the Federal Court's decision in Marsden (Liquidator) v CVS Lane PV Pty Limited Re: Pentridge Village confirms that time will be extended for Liquidators who are unable to bring Voidable Transaction Proceedings within the relevant timeframe due to a lack of funding. This Case requires Liquidators to justify subsequent claims which could otherwise have been brought at an earlier stage if funding had been available.

The Court will generally consider the following whether to extend time to bring Voidable Transaction Proceedings:

- *"the liquidator's explanation for the delay in bringing voidable transaction proceedings;*
- *the merits of the foreshadowed voidable transaction proceedings; and*
- *any prejudice that would flow from the extension of time."*

In the above Case the Liquidator made an Application for Extension for the reasons that the Liquidator required time for further investigations and the public examination of the Company's Officers in order to consider bringing Voidable Transactions Proceedings. The two Entities who opposed the Voidable Transactions Proceedings explained that the Liquidator did not sufficiently explain the delays in taking action. The Court however granted the extension on the reasons of the delay, merit of the claims and no specific prejudice towards the defendants.

The above findings are useful for Liquidators who are not properly funded to bring Voidable Transactions Proceedings in time. A lack of funding is generally a sufficient explanation for Liquidators not taking steps which they could have otherwise taken if properly funded.

50 Years!

Marjorie Pozzan, a long term friend of the Firm, was awarded her certificate for 50 Years of membership with the CPA Australia on 17th April 2018, Schon was privileged enough to have been personally invited by Marjorie to attend the ceremony.

Schon has known Marjorie for over 40 years and remembers Marjorie as the first female to be employed professionally in the Insolvency industry. He was delighted to attend the ceremony and see Marjorie not only receive her award at the Hilton Grand Ballroom but also deliver an incredible speech on behalf of ALL award recipients.

Marjorie is well regarded by a number of staff at Condon Associates and we all send Marjorie our heartfelt congratulations.

Upcoming Events

9 July 2018	-	Parramatta Accountants Discussion Group
20 September 2018	-	Condon Associates Group Charity Golf Day

Would you like to present or join any of our discussion groups? We meet on a Monthly basis for an informative presentation and engaging discussion over an enjoyable lunch.
For more information please contact Angela on 02 9893 9499 or email padg@condon.com.au

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