ON THE BEAM

CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

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A SALUTARY LESSON

By Schon G Condon RFD

For those who deal in the world of insolvency, certainly the liquidators, but I am actually including all the lawyers, accountants, finance brokers, advisers and other players of all sizes as well; then there are some salutary lessons that have come out of the largest insolvency cases that came into play during 2018. In many ways it is potentially a watershed year for corporate insolvency that could well significantly influence activity moving forward.

In 1993, around 27 years ago, the Harmer Report was published and some of the most significant changes, up to that time, were made to the Corporations Act, most notably the introduction of the Voluntary Administration regime. This heralded in a new era of rescue and recovery with much discussion going on about saving jobs, avoiding liquidation, preserving value, and building a stronger and better economy.

One of the first impacts that this new era had was that it edged into the traditional 'receivership' market, commonly referred to as the "Creditor Market" moving initially some, and then many, appointments away from the traditional "Creditor" firms; essentially because a much wider range of solutions could now be employed.

Right or wrong at that time the perception of those creditor appointments was - receivers in, business for sale, fix the secured creditor and damn the unsecured creditors and owners. Many would seek answers but the walls of the big accounting firms, the big legal firms and the fact that they surrounded the secured creditors pretty much always meant that free and open information was never forthcoming. Certainly sounds of these sorts and/or actual current issues were still ringing at the start of the recent Royal Commission.

One of the key features of these early appointments was that, working under a fairly tough timetable, the directors and the insolvency practitioner could work together to endeavour to design some form of workable solution that would see a maximum return to Creditors built on the back of the preservation of as much of the business as possible. Even if this was not possible it was still possible that more typical liquidation style methods could also be employed. One noticeable change though was that it was no longer automatic that the director was considered to be "the guilty bastard!" Mind you some certainly were and were treated accordingly by most.

Much of the work in that period excluded the very large matters as it was not considered practical to deal with the complexities of large matters within the confines of the VA Regime. It remained evident that a more preferred US Chapter 11 system was still sought for these. Lots of lawyers and lots of accountants.

Time has certainly moved on.

However in the 2018 cases there were situations where the directors have called in the professional insolvency advisers who are now allowed to run up considerable fees beforehand provided they are not offering advice. It must be a very expensive and lengthy data collection process then! What is worth of note last year though are the Channel 10 and the RCR Tomlinson matters, both large and both director appointments (no doubt with secured creditor overtones). In each case it is interesting to consider what the original directors and shareholder intentions might have been.

Did they truly walk into these situations with a high expectation that the business could highly likely end up in the hands of a major competitor, or the adviser would stand idly by the sideline and watch as the directors did a public float that the advisers will no doubt later treat as a potential breach of their duties? I suspect not.

Did the introduction of experts really assist the problem, or did they simply complicate the issue? Can a director be getting advice from an underwriter and an insolvency practitioner at the same time? And if they can, who is meant to point out the absurdity of the situation and the potential existence conflicting solutions? What it really means is that we all face a real quandary.

Yes this is a problem for the practitioners, as they will need to sort out whether something is not only legal, but also how it may be viewed by those who seek to oversee the application of the law. Thus the issue becomes, that a solution is legal in the eyes of the law, but not desired in the eyes of the regulators, then what is the next step. It's highly likely that the solution is quite likely to be practical and beneficial, but still undesirable to some! So what does society really want from this process? In my experience, at the bottom of everything is getting as much back as they can, financially.

Notwithstanding the issues for practitioners though it is the organisations that support commerce in this country, directors associations, professional bodies, industry groups and the like that should be focusing on this predicament. It is their members who will be impacted the most. As indicated earlier, there was cheering and applause in 1993 when the Harmer Report produced change because it gave directors options. Slowly but surely those options have been whittled away.

So what will the solutions of the future look like? Practical, commercial, expedient, with better returns or long and protracted with relentless visits to court?

Only the future will truly know.

Bankruptcy and the family home

By Jessica Lin

It is a common misconception that if an individual is bankrupt and they own their home, their house will be sold by their bankruptcy trustee. Given that for most people their home is their most valuable asset, it is important to consider the following options bankrupts have for keeping the family home during their bankruptcy. As discussed below, keeping the family home depends on who owns the property, the amount of equity in the property and the stance of any mortgagees and/or caveators.

Pursuant to Section 116 of the Bankruptcy Act 1966 (Cth), a bankrupt's home is divisible property i.e. it is not a protected asset. After the commencement of the bankruptcy and before either a bankrupt's discharge or until dealt with by the trustee within 6 years from the date the bankrupt disclosed the property, the bankrupt's property vests in the trustee. If there is any equity in the property, the bankruptcy trustee has a duty to realise the property (Section 19(b) and (f) of the Bankruptcy Act). In its simplest form, equity equals:

Market value of the property

Less amount owed to mortgagees(s) and caveator(s) listed on Title

Less selling costs

The following scenarios need to be considered when dealing with a bankrupt's family home:

Bankrupt is the sole owner of the property with no mortgage i.e. unencumbered property
Trustee to sell the property at market value.

The bankrupt's property is jointly owned and the co-owner is not bankrupt
There are various options to realise the Estate's interest in the property. Only the bankrupt's share of the property vests with the Trustee. The non-bankrupt co-owner's share of the property is not an asset of the bankrupt estate. Despite this, the co-owner will not be able to deal with the property without the Trustee's consent.

The co-owner can do one of the following three options:

Option 1: Make an offer to the Trustee to purchase the Estate's equitable interest in the property (generally the more viable option if there is minimal equity)

When deciding whether to accept the offer from the co-owner, the following needs to be considered:

- The Estate's equitable interest in the property
- A discount for selling costs i.e. no costs of sale as not a sale on the open market.

After the sale to the co-owner by Deed of Transfer, the co-owner needs to do the following:

- Continue paying the outgoings of the property; it is not the trustee's liability to pay these.
- Pay stamp duty on the transfer.
- Register the transfer of title (the trustee can do an updated Land Title search though)

Option 2: Cooperatively work with the Trustee in selling the property on the open market. The bankrupt's share of the net proceeds would go to the Bankrupt Estate. The non-bankrupt's co-owner's share of the property would receive their share of the net proceeds as their interest in the property is not an asset of the bankrupt's bankruptcy.

Option 3: If the co-owner and the Trustee cannot come to an agreement, the Trustee or co-owner can apply to the court for an order to obtain vacant possession and sale to sell the property. It should be noted that significant costs would be incurred with this option. As in option 2, the proceeds of the sale will be split between the trustee and the co-owner.

In the next edition we will discuss further about Bankruptcy and the family home.

ASIC staff to attend Creditors Meetings

By Padmini Saheb

The Australian Securities & Investments Commission ("ASIC") is entitled to attend any meeting of creditors or contributories held under Corporations Act (Section 75-30) of Schedule 2-Insolvency Practice Schedule. ASIC has informed the registered liquidators about starting their Pilot Program involving their staff to attend creditor's meetings in the first half of 2019.

The Pilot Program is to establish and understand how the Registered Liquidator conducts the creditors meetings and reports and accounts to creditors on the whole. The Pilot Program is to understand the information provided to creditors prior to creditors meetings and most of all the assessment of creditor claims for voting purposes.

The Pilot Program will commence sometime in February 2019 and conclude in June 2019.

Creditors Meetings will be selected randomly based on:
1. Type of Administration; and
2. Location and size of the Registered Liquidator's Firm.

The ASIC staff will advise the Registered Liquidators of their intention to attend creditors meetings and their intention to observe and participate in the meetings if appropriate.

ASIC intends to provide feedback to Registered Liquidators whether the creditors meetings are being held pursuant to the Law and Standards of the professional conduct. The results of the Pilot Program will be shared with all Registered Liquidators. ASIC will report and identify good meeting practices and on behaviours and practices that could be improve to increase creditor awareness and understand the insolvency processes and outcomes.

When a Court appoints a Provisional Liquidator

By Adam Chen

The appointment of a Provisional Liquidator would have a major effect into the affairs of a company and will only be done in circumstances where there are no other remedies available to maintain the current situation pending a final determination of a winding up application. Unlike the usual Liquidator, a Provisional Liquidator does not evaluate claims against the company or try to distribute the company's assets to creditors, as the power to realise the company's assets occurs after the Court orders liquidation.

An application for the appointment of a Provisional Liquidator is usually made by the following parties:
1. Shareholders of the Company - When they are concerned that the directors of the company are acting improperly;
2. Creditors of the Company - When they are concerned that the assets of the company are at risk or might be immoral or put beyond the reach of creditors during the period before the winding up application is heard; or
3. The Company itself - This may arise due to a dispute between directors and other officers of the company, or because the company is insolvent and the directors do not want to risk insolvent trading claims in the period before an Official Liquidator is appointed.

In the Supreme Court of New South Wales matter of Plutus Payroll Australia Pty Limited [2017] NSWSC 1041, the principles concerning the appointment of a Provisional Liquidator is confirmed.

In Plutus Payroll Australia Pty Limited, the company and a number of related entities were involved in the business of providing payroll services. The companies were also the subject of one of Australia's largest tax fraud investigations. On 6 June 2017, the Deputy Commissioner of Taxation applied for orders under section 461 of the Corporations Act 2001 (Cth) (Act) for the winding up of the companies on fair and reasonable ground and under section 472 of the Act appointing Provisional Liquidators to the companies.

Based on the evidence provided by the Deputy Commissioner of Taxation, the court was satisfied that prima facie there was a strong case for a winding up order in respect of each of the companies on the ground of insolvency and on fair and reasonable ground.

The question of whether there was sufficient cause for the appointment of Provisional Liquidators to the Companies, can be noted by the following factors considered by the Court in favour of the position that Provisional Liquidators be appointed: –
1. Directors of the Companies – the recorded Directors were not in truth, acting as the Directors;
2. The history of the Companies – the companies were engaged in phoenixing arrangements which bespeaks a risk that any one of the Companies has recoverable assets; and
3. Public interest – the companies have incurred enormous taxation liabilities and should not be permitted any longer as trading entities.

As discussed above the case sets out some of the factors the court will consider when determining whether to appoint Provisional Liquidators. As the court regularly has discretion whether to appoint a Provisional Liquidator and also given the major impact of such a step on a company, the court will not normally approve the application unless it is satisfied that there is a strong likelihood that a Liquidator will be appointed on the substantive application.

ASIC Corporate Insolvency Update Issue 10

By Sophie Bai

In December 2018, ASIC posted its Corporate Insolvency update on their website about the latest regulatory developments and issues affecting corporate insolvency markets. Here is a summary of key points:

1. Lodgement of Declarations of Independence and Relevant Relationships and Declarations of Indemnities ("DIRRI") with ASIC. ASIC provides the following key reminders when registered liquidators lodge Form 531 :-
   - ASIC believes that a natural person generates a referral and therefore a company or firm cannot of itself refer a matter;

- Form 531 should detail the referrer's full name and the firm/ business they work for;
- ASIC believes that generally the director of a company cannot refer themselves to you. The director decided to contact you for some reason and you should disclose that reason in your DIRRI;
- From 1 January 2019, ASIC may take further actions against registered liquidators should they fail to lodge DIRRI;
- A voluntary administrator must lodge a copy of their DIRRI with ASIC 'as soon as practicable' after making the DIRRI, in all voluntary administrations commencing after 1 March 2017;
- A liquidator must lodge a copy of their DIRRI with ASIC 'as soon as practicable' after making the DIRRI, in all creditors' voluntary liquidations commencing after 1 September 2017; and
- ASIC believes 'as soon as practicable' should not be more than two business days of signing it.

2. Reimbursement
ASIC emphasised the importance of registered liquidators providing sufficient meaning and clear disclosure about disbursements they are seeking, including the total amount, descriptions, the basis and method of calculation and reasons for such expenses.

3. Assetless Administration Fund
Section 90-23 of Schedule 2 of the Corporations Act 2001 grants ASIC power to appoint a Reviewing Liquidator to inquire, investigate and report on the external administration of a Company where illegal phoenix activity is suspected. Anyone can approach ASIC directly with details of their concerns including any evidence they think will assist ASIC in deciding to appoint a Reviewing Liquidator. ASIC emphasised that the Reviewing Liquidator appointments will only relate to phoenix matters but the findings may not result in enforcement actions.

The Reviewing Liquidator Panel is in the final stages to be finalised by ASIC for appointing suitably qualified and experienced Reviewing Liquidators. ASIC expects to commence appointing Reviewing Liquidators soon.

4. Report on Company Activities and Property ("ROCAP")
ASIC encourages that for all new Companies entering external administration post 1 November 2018, the Director or Officer should be provided with the ROCAP to complete. Further, Part B of ROCAP should not be lodged with ASIC.

Upcoming Events

April 2019	-	Parramatta Accountants Discussion Group
May 2019	-	Condon Forum
19 September 2019	-	Annual Charity Golf Day

Parramatta Accountants Discussion Group

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

Join us at the Parramatta Accountants Discussion Group every second Monday of the month.

If you are an Accountant, Lawyer or Financier you are very welcome to join us for an informative presentation with your fellow professionals and engaging discussion with a tasty lunch.

For more information please contact us on (02) 9893 9499 or email to padg@condon.com.au
Don't miss out!

Condon Forum

At the next Condon Forum, our three highly qualified speakers will be presenting to us on recent changes to the Tax Legislation.

Each speaker will present a differing perspective on these changes in the lead up to the new tax year.

For more information please contact us on (02) 9893 9499 or email to events@condon.com.au

RAAA and Condon Advisory Group Annual Charity Golf day

SAVE THE DATE!

Our Annual Charity Golf day will be held on 19 September 2019. If you wish to sponsor or donate please contact us on (02) 9893 9499 or email to events@condon.com.au. All proceeds will go to Legacy who supports those families who are facing daily challenges after the death or incapacitation during or after force service.

More information will be released soon.

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