ON THE BEAM

CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

Volume 8, Issue 1, February 2014

The Court's reasoning for this was as follows:

i. The two alternative appointees were both fit, capable and qualified in carrying out their duties as the nominated and appointed Liquidator; and
ii. The Administrator had already undertaken a considerable amount of time and cost in dealing with the Company's Assets and investigating into its affairs.

The Court, adopted the view that there was a benefit to Creditors of avoiding additional and mirrored costs and time required by "re-inventing the wheel" with the appointment of the Petitioning Creditors' preferred Liquidator.

So who suffers as a result? For various reasons, the Petitioning Creditors. A Petitioning Creditor generally has a professional respect for several preferred Insolvency Practitioners whom they trust and hold to be reliable and responsible. With an alternate appointee taking carriage, the relationship between the Petitioning Creditor and the opposed Appointee could be at a distance and, although the work may still be carried out professionally and appropriately, there is little relationship between the two which diminishes the value of trust.

The Court has and continues to expect that all Insolvency Practitioners act in the best interest of Creditors, regardless of how they are appointed or by whom. While the Insolvency Practitioners continue to do so the Courts will not play favourites and will act in the best interest of Creditors and not the interests of one particular party.

Section 66G of the Conveyancing Act 1919 (NSW)

By Irma Tedja and Jack Li

Section 66G of the Conveyancing Act 1919 (NSW) ("the Act") provides a mechanism where disputing joint owners can have a real estate property sold. In essence where a property is owned by more than one person, one of the parties can approach the court and seek orders for a Trustee ("66G Trustee") to be appointed and for the property to be sold. This approach is used quite often in Bankruptcy, where the Trustee of the Bankrupt Estate ("BT") cannot reach an agreement with the joint owner of a property.

Under s66G of the Act, the Supreme Court can:

"(1)…on the application of any one or more of the co-owners, appoint Trustees…[for the property] to be held by them on the statutory trust for sale or on the statutory trust for partition.

This power is qualified by the s66G(4) of the Act, which provides:

(4) If, on an application for the appointment of Trustees on the statutory trust for sale, any of the co-owners satisfies the Court that partition of the property would be more beneficial for the co-owners interested to the extent of upwards of a moiety in value than sale, the Court may…appoint Trustees of the property on the statutory trust for partition…"

Once the property has been sold, the money would then be held by the 66G Trustee and distributed in accordance with any orders of the Court.

A recent case of *Atkinson v Woodward [2012] NSWSC 434* involved a property jointly owned by a husband and wife which was financed under a mortgage. At the time the husband became bankrupt, the BT made an application to the Court for the application of Section 66G of the Act for the purpose of obtaining an Order for the sale of the property in the absence of the wife's consent. The wife argued that the property had no equity due to an existing mortgage, and hence, there would be no equity for the benefit of Creditors.

The Court rejected the wife's arguments and granted the Order to sell the Property on the following basis:

1. That at the time of the husband's bankruptcy, the rights of the husband over the property vested in the BT; and
2. The mere fact that a surplus may not result from the sale does not limit application of Section 66G and does not necessarily mean the property will not give a cost-effective return to Creditors nor that it will not be for the benefit of the estate.

The Court also ruled that the formerly common practice of appointing a third party as Trustee for Section 66G applications is not necessarily required in cases where a BT has been appointed. In this case and many other similar cases, appointing the BT as a 66G Trustee is a cost and time benefit furthering the matter and not a conflict of interests.

Should you have Clients in financial difficulties, involved in a property dispute where a Section 66G application might be a benefit, you may wish to discuss appointing a BT as they commonly deal with these issues.

Welcome to 2014, A Time to Watch Closely

By Schon G Condon RFD

The New Year is upon us and we can now say a convincing farewell to 2013, and it was an interesting year to say the least.

Musing over what I wrote last year it is interesting to note that we are still dealing with an intriguing world economic situation that sees the United States spending $85 Billion a month on bond purchases at the close of 2013 with an intention to reduce that by $10 Billion per month as we move into 2014. That will mean that if that pace is maintained, and world markets still get touchy when any form of discussion about cancelling the process come up, that debt level will have increased by $900 Billion by the time we visit next year. A truly staggering number!

As we closed out of 2013 one thing that was obvious from a local point of view however was that cash was short with many people chasing payment and the debt funders doing a roaring trade. On the other hand there appears to be a significant number of lenders in the market very keen to lend to truly good business opportunities. This is at least a healthy position to be in provided your business is itself healthy.

Increasingly businesses will see the need to both monitor and manage their operations and take prompt action when things are not correct. Speaking recently to a member of the medical profession I was reminded of an email that circulates from time to time relating to strokes. In part it indicates that if action is taken within three hours of a stroke occurring then doctors *"can totally reverse the effects of a stroke…totally"*. The problem though is that too often the individual concerned has no idea that they have had a stroke. Relevant tests are suggested but that is a story more appropriate for another medium.

In many ways this too is probably one of the most important lessons for people in business to understand. Action taken at the earliest point will often, if not always, prevent (financial) death. The real trick is to ensure that the business operator does not merely 'will' away the signs. Too often when you work backwards from a financial collapse you can easily trace the cause back to its beginnings and more often than not you can also visually see the indicators that were trying to tell the owner that something was amiss at the time.

One disturbingly noticeable increase that we saw in matters throughout 2013 was an increase in lifestyle factors being a major contributing cause of business failure. What is meant here is that the business owner lives to a lifestyle, rather than varying the lifestyle to match what income is being generated at any given point in time by the business. One of the biggest issues that brings this about is that the underlying operational business data is being tampered with. By way of example, if you take a proportion of cash out of the business before recording it, then the real profitability and performance of the business is hidden. The same is achieved by artificially increasing expenses.

Inside this issue:

Once the reporting information is incorrect then it feeds incorrect responses and the visibility of a decline in profitability is lost and more often than not is only discovered when the business has passed well beyond its survival point. In the majority of instances the owners had no understanding or comprehension because they had seen no change in their lifestyle, but as they had lived and enjoyed so had they strangled their primary lifeline, their business. For the professional corporate criminal the level of bookkeeping is actually incredible, well beyond the needs for any normal business because there are at least two sets of books and at least one person who is able to accurately reconcile one to the other and prove to the owner exactly where everything was. In almost forty years of accounting I have only ever seen one example of this and they wanted to sell the business…it took more than four years to align the books so that the business could be sold for fair value!

Slowly the economic environment will improve, but it will be a long process and we must remain vigilant, attentive and responsive. Certainly we look forward to more turnaround work than windings up, but in essence it will be the directors and their advisers that will make the ultimate decision.

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In closing we regrettably have said goodbye to our Senior Associate, Hakki Hassan who has decided to move on and in saying goodbye we wish him all the best in his future endeavours, whatever they may be.

Looking forward to a challenging and rewarding 2014 for one and all.

Enjoy the read.

Business Ethics Part 4 – Eliminating Corporate Wrongdoings

By Brandon Lee

"If ethics are poor at the top, that behavior is copied down through the organisation."

– Robert Norton Noyce, "the Mayor of Silicon Valley".

In the wake of numerous corporate scandals between 2001 and 2004 affecting large multi-national companies like Enron, HIH Insurance, One.Tel and WorldCom, even small and medium-sized companies have begun to appoint ethics officers. They often report to the CEO and are responsible for assessing the ethical implications of the Company's activities, making recommendations regarding the Company's ethical policies, and disseminating information to employees. They are particularly interested in uncovering or preventing unethical and illegal actions.

When practicing unethical behaviour, the individual finds it necessary to engage in exhausting subterfuge, resulting in diminished effectiveness and little achievement. Therefore a Company can strengthen its public image by training in business ethics. In my opinion, the effectiveness of ethics officers in the market places is unclear. If the appointment is made primarily as a reaction to legislative requirements, one might expect the efficacy to be minimal, at least, over the short term. In part, this is because ethical business practices result from a corporate culture that consistently places value on ethical behaviour, a culture and climate that usually emanates from the top of the organisation. The mere establishment of a position to oversee ethics will most likely be insufficient to encourage ethical behaviour among employees and directors. A more systemic programme that helps with the detection, investigation and elimination of corporate wrongdoing will be necessary to overcome this issue.

One way to deal with corporate wrongdoing is to encourage the activity of whistle-blowing. The individual being investigated would not be able to hide behind the company and delegate its blame to it; he or she will have to face the embarrassment of the unethical conduct that has the potential of ruining their reputation. Therefore this would make other potential wrongdoers think twice before trying to commit a corporate misconduct. A major corporate scandal which was exposed through whistle blowing was the Enron accounting fraud scandal.

There are advantages in seeking to identify and deal with corporate wrongdoing. These advantages include the creation and implementation of corporate self-regulation through voluntary codes of corporate conduct that helps create a positive, law-abiding corporate ethos; early detection and prevention of corporate misconduct; the prevention of ruining the reputation of the Company and saves the embarrassment that has to be faced by directors if they were to be criminally charged for any liabilities; and finally it will help improve the Company's business as other Companies would be more at ease in doing business with them.

The major drawback in seeking to identify and deal with corporate wrongdoing is the costs associated with investigating and bringing legal actions, if any misconduct has been detected. The costs of designing, implementing and sustaining a corporate code of conduct also has to be taken into account. Moreover, in a hypothetical scenario whereby a Company is suspected of corporate misconduct, but it is found that there was no breach or any wrongdoing after thorough investigations, it could still ruin the reputation of the Company and consequently cause a loss to them. This issue would be disastrous if the media is involved in the investigation of the Company because news would be spread, consumers would then lose confidence in the Company and hence there would be loss of loyal regulars and profit. The careers of the Company directors and employees may also be drastically affected if they are being investigated on suspicion of involvement in corporate misconduct because it would be as if their privacies are being robbed and transparent to the world.

Many great historical philosophers such as Plato, Socrates and so on consider ethics to be the "science of conduct". Others explain that ethics includes the fundamental ground rules by which we live our daily lives. Many ethicists consider emerging ethical beliefs to be state of the art legal matters; an apparent example in our modern world is that what becomes an ethical guideline today is often translated to a law, regulation or rule of tomorrow. Therefore in order for the world's economy to develop and grow, the degree of social responsibility in Companies must likewise grow. It is in the best interests of the Company, the consumer, the employee and the environment in general.

In conclusion, I stand by my opinion that business ethics is emerging as one of the greatest recognised needs in business and government today. No other element in business life can profit so greatly for such a small investment. Lacking this, no other element can cost business so dearly.

The Practical Effects of PPSA

By Padmini Saheb

The Australian case law which may have assisted us to understand the following practical effects of the PPSA:

In the collapse of the Hastie Group Limited the Administrators applied to the Court to sell equipment even though they were registered with the PPS Register. In this case Administrators faced difficulties in identifying items of Plant & Equipment subject to security and the Court made directions for the sale of such assets.

Even though the Administrators wrote to the PPSA secured parties, the equipment remained unclaimed. This case confirms that Administrators are able to get directions from the Court allowing the sale of property owned by secured parties and distribute proceeds of such sales in due course when secured parties don't respond to the Administrator's requests and the Administrator can not otherwise determine who owns the personal property.

In his Decision Justice Yates was satisfied that there were genuine difficulties in identifying the items of Plant & Equipment which were subject to security. He was also satisfied that the Administrators had taken various steps to clarify their position to the best of their ability. Based on the circumstances he considered it was appropriate to grant relief and give directions sought by the Administrators.

The Security interest against the Company must be registered within:

1. Six months before the insolvency of the Company;
2. Within twenty business days of the date the Security Interest was entered into or of the date of the Insolvency of the Company (whichever is earlier).

In Summary the above Case points out that:

I. The time limits in registering on the PPSR. Don't rely solely on the hope you will make an application to the Court for extra time and this will be granted; and
II. One should maintain proper records and processes to respond promptly and accurately to requests for information, especially from an Administrator or Liquidator.

Liquidator's Power to Act for All Creditors

By Hiteshi Dekhtawala

In a recent High Court Decision, Willmott Growers Group Inc. v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation) [2013] HCA 51, it was confirmed that a Liquidator of a landlord Company has the power to disclaim lease with the effect of terminating a tenant's interest in a property.

Pursuant to Section 568 (1) of the Corporations Act, the Liquidators applied to the Court for Orders along with a declaration that they were entitled to disclaim the lease between the landlord Company and the tenants. The Liquidators had no alternative but to disclaim the lease as no potential buyers were interested in purchasing the property subject to leases.

The tenants argued that the disclaimer of the lease could not adversely affect their rights in the leased property as the granting of lease to them had created a proprietary interest in the property. The tenants also claimed that the loss in profit estimated to be suffered by them due to the disclaimer would be much higher than the gain estimated to be achieved by the remaining creditors in the Liquidation. As such, disclaiming the lease by the Liquidators may not be a reasonable decision. Despite the tenants' arguments, the Court ordered that the tenants' interest in the lease is extinguished effective the date of the issue of the disclaimer pursuant to section 568D of the Act and that the tenants would be in line with the other unsecured creditors in the Liquidation.

The above decision confirmed that such leases are classed as contracts and as such can be disclaimed pursuant to section 568 (1) of the Act and that any rights that the tenants held pursuant to the lease, get extinguished effective the date of the disclaimer.

Clearly, the above decision appears to be of great significance to commercial tenants and their financiers leaving them in a highly insecure position should their landlord Company be placed into Liquidation. As such, these stakeholders are now expected to conduct more stringent checks before signing leases.

Source:

http://www.gadens.com.au/publications/Pages/Disclaimer-of-leases-following-Willmott-Forests-%E2%80%93-The-picture-remains-incomplete.aspx

http://www.corrs.com.au/publications/tgif/high-court-upholds-victorian-court-of-appeal-s-willmott-decision-on-disclaimer-by-liquidators/

Re-Inventing the Wheel

By Leonard Khoury

It is common for Directors of a Company to appoint an Administrator to control as a Winding Up application against that Company is in progress. To clarify, the appointment of an Administrator does not stop the Winding Up proceedings, rather, it develops into two (2) alternative processes relating to the future of the Company and the preferred Practitioners appointment. This becomes a decision for the Court to rule once all facts and evidence are taken into consideration.

In a recent Supreme Court of Queensland case, *Deputy Commissioner of Taxation v Impress Enterprises Pty Limited* [2013] FCA 1126 ("Impress Case"), an Administrator took control of the Company's affairs and there was no view or intention by the Directors to put forward a proposal for a Deed of Company Arrangement. The facts of the case revealed that the Company was clearly insolvent and as no proposal for a DCA would be received, there was no alternative than to have the Company wound up.

The question was raised though as to what will happen to the future of the Company and who will take control (the Administrator already appointed or the preferred Liquidator nominated by the Petitioning Creditor).

In the Impress Case, the Court ruled and the incumbent Administrator was the most suitable appointee in this situation.