

Commercial & Insolvency Law

Wednesday 24 October 2018

Seminar duration: 3.00pm – 5.00pm

**NSW Bar Dispute Resolution
Centre - Hearing Room 1
Level 1, 174 Phillip Street, Sydney**

<http://josephrolella.com.au/>

The net proceeds will be donated to a charity located close to my home in Birchgrove/Balmain, which provides educational support to high potential kids facing disadvantage; *The Harding Miller Education Foundation* (<https://www.hardingmillereducationfoundation.org.au/>)

I am a Chartered Accountant and was reportedly the youngest partner of any accounting firm ever when I became a partner at Hall Chadwick on my 23rd birthday. I became National Chairman of that group and we employed 250 staff. I was a Board member of the State Chamber of Commerce and have owned an investment company in Hong Kong. I have been a registered trustee in bankruptcy and I am still a liquidator after 30 years and various ups and downs. Since the late 1990s I have also practiced as a barrister and have done so somewhat exclusively for the last 10 years. My work as a barrister has been varied, not only on the type of work, but also the clients.

Geoffrey McDonald

Source of information;

HCA

ARITA

AFSA

ASIC

NSWSCA

FCAFC

INO

Outline of Commercial & Insolvency Law Seminar (2 hours)

1. High Court and other superior Courts

- **Holding DOCAs approved**
- **Liquidator of Corporate Trustee; trust assets or corporate assets**
- **Other Courts**

2. New and Proposed laws

- **12 Month Bankruptcy**
- **Safe Harbour**
- **Ipsos Facto clauses**
- **Postal rule**
- **AFSA and ASIC**

Outline of Commercial & Insolvency Law Seminar (1 ½ hours)

2A. Phoenix Companies

3. Developing laws

- **FEG and s596AB**
- **s553C set-off**

4. Recent trials by Geoffrey (audience to select discussion)

1. High Court

In Farah Constructions Pty Ltd v Say-Dee Pty Ltd,[46] Gleeson CJ, Callinan, Heydon and Crennan JJ said that “intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong” [12] citing Australian Securities Commission v Marlborough Gold Mines Ltd [1993] HCA 15 at 492 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.

1. High Court

Mighty River International Limited v Hughes, Mighty River International Limited v Mineral Resources Limited, [2018] HCA 38

21 Clause 9 of the Deed included provisions that the Administrators were to "investigate any claims that they are aware the Company may have against any third parties", to "seek Proposals to reconstruct the Company ... where the Company's securities may be re-quoted for trading on the ASX, including Proposals for the partial or full sale of the Company's assets", and, prior to any proposal being accepted, to convene a further meeting of creditors to put to them such a proposal, together with "the key terms of any further deed of company arrangement (or proposed variation to this deed).

1. High Court

22 ...The Deed also provided in cl 8 that, subject to its variation, "there will be no property of the Company available for distribution to Creditors under this deed".

23 By 3 May 2017, six months after the execution of the Deed, the Administrators were required to provide a report including the results of their investigations. Although a meeting of the creditors was convened on 3 May 2017, and a variation to the Deed was later executed, it is the Deed, executed on 3 November 2016, which was before the Master and the Court of Appeal, and with which this C is concerned

1. High Court

34. Although an extension of time under s 439A(6) can only be obtained by a court order, as Mighty River accepted in oral argument, an otherwise compliant instrument that becomes a deed of company arrangement can incidentally extend time for an administrator's investigations pending a subsequent variation to it.

- Cases decided
- Case summaries
- Special leave applications results
- Recent AV recordings

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Carter Holt Harvey Woodproducts Australia Pty Ltd v. Commonwealth of Australia & Ors

Case No.
M137/2018

Case Information

Lower Court Judgment

28/02/2018 Supreme Court of Victoria (Court of Appeal)
(Ferguson CJ, Whelan, Kyrou, McLeish & Dodds-Streeton JJA)

[\[2018\] VSCA 41](#)

Catchwords

Corporations – Trustee corporations – Corporations Act 2001 (Cth) s 433(2) – Where creditors resolved to wind up corporate trustee – Where receivers sought directions – Where primary judge held receivers justified in proceeding on basis receivership surplus properly characterised as trust property and s 433 did not apply to surplus – Where Court of Appeal allowed appeal – Whether Court of Appeal erred in concluding “property of the company” in s 433(2) included not only trustee’s right of indemnity but also underlying trust assets to which trustee company could have recourse – Whether Court of Appeal erred in concluding corporate trustee’s right of indemnity from trust assets was “property comprised in or subject to a circulating security interest” for purposes of s 433(2).

Documents*

- 17/08/2018 [Hearing](#) (SLA, Melbourne)
- 31/08/2018 Notice of appeal
- 05/10/2018 [Written submissions](#) (Appellant)
- 05/10/2018 [Chronology](#) (Appellant)
- 02/11/2018 Written submissions (Respondents)
- 16/11/2018 Reply

*The due dates shown for documents on this page are indicative only.

More in this category: [« Case P55/2011](#) [Case S51/2011 »](#)

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1. High Court Appeal to be heard re Amerind

Trustee corporations – Corporations Act 2001 (Cth) s 433(2) – Where creditors resolved to wind up corporate trustee – Where receivers sought directions – Where primary judge held receivers justified in proceeding on basis receivership surplus properly characterised as trust property and s 433 did not apply to surplus.

1. High Court Appeal to be heard re Amerind

Where Court of Appeal allowed appeal – concluding “property of the company” ... included not only trustee’s right of indemnity but also underlying trust assets to which trustee company could have recourse and corporate trustee’s right of indemnity from trust assets was “property comprised in or subject to a circulating security interest”

1. High Court Appeal to be heard re Amerind

“9. ... According to the decision in Amerind, the right of exoneration is now to be regarded as an asset available to be used to discharge all debts of the trustee.”

Lane (Trustee), in the matter of Lee (Bankrupt) v Commissioner of Taxation (No 3) [2018] FCA 1572

1. High Court Appeal to be heard re Amerind

“the insolvency of a trustee now negates the historically accepted position that “a creditor to whom the trustee has properly incurred a debt in the administration of the trust has an advantage over creditors whose debts are unrelated to the trust””

Lane (Trustee), in the matter of Lee (Bankrupt) v Commissioner of Taxation (No 3) [2018] FCA 1572

1. Other Superior Court; re Liquidator's examination

Pleash (Liquidator) v Tucker [2018] FCAFC 144

The Full Court of the Federal Court has held that there was no basis to extend the scope of 'examinable affairs' under the Corporations Act 2001 (Cth), s 597(9) to include the financial documents of a trust, where the examinee has no proprietary interest in the trust assets but the liquidator contends those assets might be available to satisfy a prospective judgment debt.

1. Other Superior Court; re Personal Guarantees

Darwin Foods Pty Ltd v Gray [2018] SASCF 84

The SA SC FC has found that supplies made after the date of bankruptcy under a continuing divisible guarantee agreement were not provable debts under s 82 of the Bankruptcy Act 1966 (Cth), such that a Personal Insolvency Agreement operated to release the respondent from the relevant debts.

1. Other Decisions; re Objection to Discharge

The Tribunal emphasised that a request under s 149D(1)(d) has five distinct elements, all of which must be fulfilled ([36]):

- 1. the request must be to the bankrupt (element 1)*
- 2. the request must be in writing (element 2)*
- 3. the request must be by the trustee (element 3)*
- 4. the request must be to provide written information (element 4)*
- 5. the information requested must be about the bankrupt's property, income or expected income (element 5).*

In summary, the Tribunal took a literal approach to s 149D(1)(d), required 'strict compliance'.

2. New and Proposed laws

The purpose of the Bill is reduce the default period of bankruptcy from three years to one year, including measures to extend the income contribution obligations of discharged bankrupts for a minimum period of two years following discharge or, if extended due to non-compliance, for five to eight years.

Bankruptcy Amendment (Enterprise Incentives) Bill 2017

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/billhome/s1097%22>

2. New and Proposed laws

“As we have previously highlighted, safe harbour is not a ‘state’ or ‘status’ that a company enters. It is a set of actions which may offer protection to directors from insolvent trading liabilities in the event the company ends up in liquidation.”

Australian Restructuring Insolvency and Turnaround Association (ARITA)

CORPORATIONS ACT 2001 - SECT 588GA Safe harbour--taking course of action reasonably likely to lead to a better outcome for the company

2. New and Proposed laws

Ipsa facto 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. These types of clauses are regularly found in leases, supply agreements, licences etc.

New and Proposed laws

451E Stay on enforcing rights merely because the company is under administration etc.

(1) A right cannot be enforced against a company for:

***(a) the reason that the company has come or is under administration;
or***

***(b) the company's financial position, if the company is under
administration; or***

***(c) a reason, prescribed by the regulations for the purposes of this
paragraph, or***

***(d) a reason that, in substance, is contrary to this subsection;
if the right arises for that reason by express provision (however
described) of a contract, agreement or arrangement.***

2. New and Proposed laws

The final regulations and declaration providing for exclusions from the new stay on the enforcement of ipso facto clauses are now available.

The Corporations Amendment (Stay on Enforcing Certain Rights)

Regulations 2018 (Cth) have been made and were registered on the Federal Register of Legislation on 22 June 2018.

The Corporations (Stay on Enforcing Certain Rights) Declaration 2018 has also been made and was registered on 28 June 2018.

ipso Facto clauses

2. New and Proposed laws

Civil Law & Justice Legislation Amendment Act 2018 was passed by the Parliament and included changes to s 160 of the Evidence Act 1995 (Cth) (Evidence Act) to extend the time for the operation of the postal rule presumption from four to seven working days.

2. New and Proposed law/practice; AFSA

Annulments under s153A: when tax returns are not up to date

It is certainly preferable for all tax returns to have been lodged and then for the Australian Taxation Office (ATO) to have been given the opportunity to lodge a proof of debt, but there is no legislative basis for delaying the annulment on this basis.

where a creditor has not proved in the bankruptcy. In that case, the debt will be revived notwithstanding an annulment pursuant to s153A.

This is implicit in the definition of 'bankrupt's debts' in s153A(6).

Personal Insolvency Regulator, Volume 16, Issue 3, September 2018

2. New and Proposed laws/practice; ATO/ASIC

New phoenix hotline

The ATO acknowledges the unique position insolvency practitioners are in to identify potential illegal phoenix activity. You are also aware that the actions of a few can tarnish the reputation of the industry as a whole, so we have taken steps to make it easier for you to report individuals or businesses that may be engaging in illegal phoenix activity.

2. New and Proposed law/practice; AFSA

Be aware of the untrustworthy advisor (UA)

Some tell-tale signs of a UA potentially engaging in unlawful conduct include:

- the UA providing to the trustee their own contact address as the contact address for the bankrupt and creditors and insisting all enquiries be through them***
- mortgages being taken out on property just before bankruptcy***
- use of false companies to claim manufactured debts***
- high number of 'friendly' creditors recorded as unsecured debts***
- lack of supporting documents for proofs of debt***
- late inclusion/submission of proofs of debt in compositions or PIAs.***

2. New and Proposed laws/practice; ASIC

Illegal phoenix activity

Key players can include:

- **Pre-insolvency adviser: Untrustworthy advisers maintain a network of 'friendly' professionals and encourage activity, often by cold-calling.**
- **Valuer: A 'friendly' valuer provides a low valuation for the company's assets**
- **Liquidator: A 'friendly' liquidator who avoids their responsibilities (for example, by not investigating, recovering assets or reporting their findings to ASIC and creditors)**
- **Dummy directors: The new company operators may include relatives/associates or someone with no knowledge of the company**
- **Phoenix operator: A 'controlling mind' who evades tax and other obligations**

2A. Phoenix Companies

8...in the weeks prior to this hearing, those in control of Bux Global took steps which support the conclusion that the business relating to the Bux Apps was, to use the modern parlance, phoenixed into another company. Indeed, this is a view which Mr Beattie, has identified evidence to support ... ;

24 ... Bux Global has, on Mr Beattie's investigations to date, been trading only with the support of Champagne, the party who has provided him with funds for the purposes of the administration. In those circumstances it is very difficult to see how Mr Beattie could consider that he would meet the requirement that he be seen to be completely independent

Hooke v Bux Global Limited (No 6) [2018] FCA 1545

2A. Phoenix Companies

o It will now be an offence for company directors to engage in creditor defeating transfers of company assets that prevent, hinder or significantly delay creditors' access to those assets.

o Pre-insolvency advisers and other facilitators of illegal phoenix activities will also be on the hook, with a separate offence for any person who procures, incites, induces or encourages a company to make creditor defeating transfers of company assets.

o These will be both criminal and civil offences, attaching the highest penalties available under the law.

(The Hon Kelly O'Dwyer, Minister for Revenue and Financial Services)

2A. Phoenix Companies

- ***Prevent directors from backdating their resignations;***
- ***Prevent sole directors from resigning and leaving a company as an empty corporate shell with no directors;***
- ***Restrict the voting rights of related creditors of the phoenix company at meetings regarding the appointment or removal and replacement of a liquidator;***
- ***Make directors personally liable for GST liabilities, as part of extended director penalty provisions.***
- ***Extend the ATO's existing power to retain refunds where there are outstanding tax lodgements.***

Phoenix Companies

“Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018”

and

“Insolvency Practice Rules (Corporations) Amendment (Restricting Related Creditor Voting Rights) Rules 2018”.

and

***Modernising Business Registers and Director Identification Numbers
legislation***

2A. Phoenix Companies

588FDB Creditor defeating disposition

(1) A disposition of property of a company is a creditor defeating disposition if the disposition has the effect of:

(a) preventing the property from becoming available for the benefit of the company's creditors in the winding up of the company

2A. Phoenix Companies

(6B) The transaction is voidable if:

***(a) it is a creditor defeating disposition of property of the company;
and***

(b) at least one of the following applies:

***(i) the transaction was entered into, or an act was done for the
purposes of giving effect to it, when the company was insolvent;***

***(ii) the company became insolvent because of the transaction or an
act done for the purposes of giving effect to the transaction; OR***

2A. Phoenix Companies

(iii) less than 12 months after the transaction or an act done for the purposes of giving effect to the transaction, the start of an external administration (as defined in Schedule 2) of the company occurs as a direct or indirect result of the transaction or act;

AND

2A. Phoenix Companies

(c) the transaction, or the act done for the purpose of giving effect to it, was not entered into, or done:

(i) under a compromise or arrangement approved by a Court under section 411; or

(ii) under a deed of company arrangement executed by the company; or

(iii) by a liquidator of the company; or

(iv) by a provisional liquidator of the company.

2A. Phoenix Companies

(8) A court is not to make under section 588FF an order solely on the grounds of subsection 588FE(6B) (as applying wholly or partly because of subparagraph 588FE(6B)(b)(i) or (ii)) if it is proved that paragraphs 588GA(1)(a) and (b) apply in relation to an officer of the company and the disposition. For the purposes of determining whether it is proved that those paragraphs apply in that way:

(a) subsections 588GA(2) to (7) apply; and

(b) section 588GB applies as if the proceeding under section 588FF were a relevant proceeding.

2A. Phoenix Companies

(9) A court is not to make, solely on the grounds of subsection 588FE(6B) (about a creditor defeating disposition of property), an order under section 588FF materially prejudicing a right or interest of a person to whom the disposition of property was made if:

(a) there is evidence before the court that suggests a reasonable possibility that:

(i) consideration was given for the disposition; and

(ii) the value of the consideration was at least the market value of the property at the time of the disposition or at the time the relevant agreement (as defined in section 9) was made for the disposition

(b) the court is not satisfied that subparagraph (a)(ii) does not apply

2A. Phoenix Companies

588GAB Procuring creditor defeating disposition

(1) A person must not engage in conduct of procuring, inciting, inducing or encouraging the making by a company of a disposition of property that results in the company making the disposition of the property, if:

(a) one or more of the following applies:

(i) the company is insolvent;

(ii) the company becomes insolvent because of the disposition or a number of dispositions made at the time of the disposition;

2A. Phoenix Companies

588GAB Procuring creditor defeating disposition

... or

(iii) less than 12 months after the disposition, the start of an external administration (as defined in Schedule 2) of the company occurs as a direct or indirect result of the disposition; and

(b) the disposition is a creditor defeating disposition.

Note 1: Failure to comply with this subsection is an offence: see subsection 1311(1).

3. Developing laws re s596AB

CORPORATIONS ACT 2001 - SECT 596AB

Entering into agreements or transactions to avoid employee entitlements

(1) A person must not enter into a relevant agreement or a transaction with the intention of, or with intentions that include the intention of:

(a) preventing the recovery of the entitlements of employees of a company; or

(b) significantly reducing the amount of the entitlements of employees of a company that can be recovered.

3. Developing laws re s553C set-off

CORPORATIONS ACT 2001 - SECT 553C

Insolvent companies--mutual credit and set-off

(1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:

(a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; ...

(c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.

3. Developing laws re s553C set-off

CORPORATIONS ACT 2001 - SECT 553C Insolvent companies--mutual credit and set-off

(2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.

3. Developing laws re s553C set-off

The case involved an unfair preference claim for multiple payments over a five month period. The liquidators' claim was defended on a number of alternative grounds, including s 553C set-off.

Against a preference claim in the order of \$308,000, the defendant argued that, under s 553C of the Corporations Act, it was entitled to set off around \$80,000 being the amount in which the company was indebted to the defendant on the day the winding up was taken to have begun (ie, the date of appointment of voluntary administrators).

3. Developing laws re s553C set-off

Markovic J noted that the liquidators accepted ‘that the balance of authority permits s 553C set-off to be utilised in voidable transaction claims referring to the decisions in Re ACN 007 537 000 Pty Ltd (in liq); Ex Parte Parker (1997) 80 FCR 1 (Re Parker) at [11]; Hall v Poolman (2007) 215 FLR 243; [2007] NSWSC 1330; and the reasons of Young JA in Buzzle Operation Pty Ltd (in liq) v Apple Computer Australia Pty Ltd (2011) 81 NSWLR 47.’

Stone v Melrose Cranes & Rigging Pty Ltd, in the matter of Cardinal Project Services Pty Ltd (in liq) (No 2) [2018] FCA 530

3. Developing laws re s553C set-off

The recent NSW Supreme Court decision saw a liquidator's claim against a director (for a loan account) dismissed because the director successfully invoked set-off under s 553C of the Corporations Act. The case is interesting for the fact that a pre-liquidation assignment of a debt owed by the company (and held on constructive trust) was the basis of the director defendant's asserted set-off.

Michael Gregory Jones as Liquidator of SBH Australia Pty Limited (In Liq) & Anor v Joseph Cummins [2018] NSWSC 606

3. Developing laws re s553C set-off

The Appeal Court overturned the decision and held that, at the commencement of the winding up, Forge's claims under the contracts were, in substance, recoverable for the benefit of Forge rather than for the bank. Thus the dealings between Hamersley and Forge were mutual dealings under s 553C, notwithstanding the bank's security interest: [8]; [131]-[132]; [138].

Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (In Liq) (Receivers and Managers Appointed) [2018]

WASCA 163

4. Recent trials by Geoffrey (audience to select discussion)

- ***Termination of a winding up (s 90-15)***
- ***Jurisdiction of NSWSC to extend caveat over property of a trustee***
- ***Threshold question on Security for Costs***
- ***Statutory Demand for judgment debt corrected after service under slip rule***
- ***Statutory Demand and Graywinter principle “rejecting” evidence***
- ***Guarantor being liable for signing as a director, not as guarantor***
- ***Summary dismissal of pleadings***
- ***The 4th limb of fraud under the Earl of Chesterfield 1750 case***
- ***Transfer of proceedings to the Federal Court from the NSWSC***
- ***Transfer of proceedings to another State Court from the NSWSC***
- ***Family Court application to annul a bankruptcy***
- ***Family Court application for financial Orders and to set aside a BFA/previous Orders***
- ***AAT cases on tax law and sufficient proof***
- ***AAT case on ASIC decision to disqualify a director***
- ***Legal privilege of director against Liquidator***
- ***Bankrupt offence for incurring credit under false name***
- ***Expert accountant on amount of damages***

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