WINDEYER CHAMBERS 9

Tuesday 24 October and
Thursday 2 November 2017

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Insolvency & Commercial Law

Disclaimer: All material contained in this paper is written by way of general comment. No material should be accepted as legal advice and any reader wishing to act upon material contained in this paper should first contact Mr McDonald for properly considered professional advice, which take into account specific situations

OUTLINE

Insolvency Law Reform Act

Other law reform; Phoenixing (see paper)

Other law reform; Safe Harbour and ipso facto clauses (see paper)

Other law reform; One year bankruptcy (see paper)

PPS law

Unfair Contract terms

Trusts

Superior Court decisions

Insolvency Law Reform Act Commenced 1 March 2017

Registering and disciplining practitioners

Company's former name (obtain court leave to dispense with the requirement to set out a company's former name on public documents and negotiable instruments)

Insolvency Law Reform Act Commenced 1 March 2017

New definition of 'relation back day' (the 'relation-back day' will be the day the earlier winding-up application was filed).

New requirement for lodgement of declaration of relevant relationships and indemnities (DIRRIs).

Amendment to Corps Act s 588FGA ('court' instead of 'Court').

Insolvency Law Reform Act Commenced 1 March 2017

Contravention of a DOCA:

New s 445HA (Notification of contravention of a DOCA) will require directors to notify the DOCA administrator - and DOCA administrators to notify creditors - of any material contravention of a DOCA, or likelihood thereof, of which the director/DOCA administrator becomes aware (which occur on or after 1 March 2017, regardless of when the DOCA was executed)

Insolvency Law Reform Act Commenced 1 March 2017

External administrator's ability to assign right to sue under Corporations Act:

The right of external administrators to assign office-holder actions is provided by s 100-5 (Part 4) of the new Insolvency Practice Schedule (Corporations). A similar right is provided for trustees-in-bankruptcy under the equivalent provision of the Insolvency Practice Schedule (Bankruptcy).

Insolvency Law Reform Act Commenced 1 March 2017

100-5 External administrator may assign
(1) … an external administrator of a company may assign any right to sue that is conferred on the external administrator by this Act.

(2) If the external administrator's action has already begun, the external administrator cannot assign the right to sue unless the external administrator has the approval of the Court.

(3) Before assigning any right under subsection (1), the external administrator must give written notice to the creditors of the proposed assignment.

Insolvency Law Reform Act Commenced 1 Sept 2017

Meetings

- 'Virtual' meetings permitted, as in bankruptcy but for single resolution only
- ASIC and AFSA may direct meetings and they may attend
- Specific power of the court to review resolutions determined by related party votes
- Similar convening etc. processes for corporate and personal

Insolvency Law Reform Act Commenced 1 Sept 2017

Meetings

- Meetings of creditors are to be discretionary in most cases.
- Creditors will be able to direct meetings be held depending on percentage of votes and value of claims
- No first meeting in a creditors' voluntary liquidation (CVL)
  - 5% or more of unrelated creditors will be able to request a meeting within the first 2 weeks

Insolvency Law Reform Act Commenced 1 Sept 2017

Schedule 2— Insolvency Practice Schedule (Corporations)

90-35 Removal by creditors

Creditors may remove external administrator and appoint another

(1) The creditors may, by resolution at a meeting, remove the external administrator of a company if at least 5 business days' notice of the meeting is given to all persons who would be entitled to receive notice of creditors' meetings.

Insolvency Law Reform Act Commenced 1 Sept 2017

ARITA Q5. What happens if a meeting is convened and held for a particular purpose - say, to approve remuneration - and at the meeting creditors then decide to attempt to replace the external administrator?

Insolvency Law Reform Act Commenced 1 Sept 2017

IPR 75-265 - which sets out the requirements for a meeting to remove an external administrator - requires a DIRRI 'to be given to the creditors at the same time as notice of the meeting to appoint the incoming [external] administrator is given'

IPR 75-15 (1) Notice of a meeting must: …

(b) specify the purpose for which the meeting is being convened

In short, 'ambush' resolutions attract possible challenges to validity.

Insolvency Law Reform Act Commenced 1 Sept 2017

IPR 75-115

4) If no result is reached under subsection (1) or (2) and the resolution relates to remuneration, the resolution is not passed.

(5) If no result is reached under subsection (1) or (2) and the resolution relates to the removal of the external administrator of the company:

(a) the external administrator may exercise a casting vote in favour of the resolution, in which case the resolution is passed; or

(b) if paragraph (a) does not apply—the resolution is not passed.

Insolvency Law Reform Act Commenced 1 Sept 2017

IPR 75-115

(6) If no result is reached under subsection (1) or (2), the trustee must:

(a) inform the meeting of the trustee's reasons for exercising, or not exercising, as the case may be, a casting vote under subsection (3); and

(b) include those reasons in the minutes of the meeting.

Insolvency Law Reform Act Commenced 1 Sept 2017

IPR(B) 75-132 When a special resolution is passed at a meeting of creditors

(1) A *special resolution* is passed at a meeting of creditors of a regulated debtor if:

(a) 50% of the creditors voting at the meeting vote in favour of the resolution; and

(b) 75% in value of the creditors voting at the meeting vote in favour of the resolution; and

(c) if the resolution relates to paragraph 109(1)(j) of the Act—the notice convening the meeting at which the resolution was passed contained a copy of the proposed resolution.

(2) Otherwise, the special resolution is not passed.

Insolvency Law Reform Act Commenced 1 Sept 2017

90-15 Court may make orders in relation to external administration

(1) The Court may make such orders as it thinks fit in relation to the external administration of a company.

(2) The Court may exercise the power under subsection (1):

(a) on its own initiative, during proceedings before the Court; or

(b) on application under section 90-20.

Insolvency Law Reform Act Commenced 1 Sept 2017

90-15 Court may make orders in relation to external administration

Examples of orders that may be made

(3) Without limiting subsection (1), those orders may include any one or more of the following:

(a) an order determining any question arising in the external administration of the company;

(b) an order that a person cease to be the external administrator of the company;

(c) an order that another registered liquidator be appointed as the external administrator of the company;

Insolvency Law Reform Act Commenced 1 Sept 2017

90-15 Court may make orders in relation to external administration

(d) an order in relation to the costs of an action (including court action) taken by the external administrator of the company or another person in relation to the external administration of the company;

(e) an order in relation to any loss that the company has sustained because of a breach of duty by the external administrator;

(f) an order in relation to remuneration, including an order requiring a person to repay to a company, or the creditors of a company, remuneration paid to the person as external administrator of the company.

Insolvency Law Reform Act Panel discussion

Panel:

Cor Cordis (www.corcordis.com.au)

Jirsch Sutherland (www.jirschsutherland.com.au)

Mackay Goodwin (www.mackaygoodwin.com.au)

O'Brien Palmer (www.obp.com.au)

Veritas Advisory (www.veritasadvisory.com.au)

Worrells Solvency and Forensic (www.worrells.net.au)

OUTLINE; Law Reform

Other law reform; Phoenixing (see handout)

Other law reform; Safe Harbour and ipso facto clauses

Australian Financial Complaints Authority (AFCA)

Other law reform; One year bankruptcy

FEG/GEERS abuse (see handout)

PPS law

Unfair Contract terms

Foreign resident capital gains withholding

PPS law

GREENLIGHT ASSET PTY LTD -v- WBK RICETTI PTY LTD [2017] WASC 278

This was the plaintiffs' originating process brought pursuant to s 588FM of the Corporations Act 2001 (Cth) (the Act) and s 293(1)(a) of the Personal Property Securities Act 2009 (Cth) (PPSA) to have certain dates in May fixed as the time for the plaintiffs to register security interests in certain personal property. Those dates would then be the date of registration for the purposes of s 588FL(2)(b)(iv) of the Act. No party appeared to oppose the application. After considering the matter I made orders sought by the plaintiffs.

PPS law

16 … However, if a court is not satisfied there is no risk that unsecured creditors could be adversely affected the unsecured creditors (or their representatives) are entitled to be heard against the making of an order. This may be sufficiently achieved by suspending the operation of the order or by imposing a term reserving leave to apply to set aside in the event of a liquidation or administration: see Re Appleyard [25]; Re Accodale Wines Australia Ltd [2016] NSWSC 1023 [19].

OUTLINE; PPS law

Personal Property Securities Amendment (PPS Leases) Act 2017

Summary

Amends the Personal Property Securities Act 2009 to: extend the minimum duration of personal property securities (PPS) leases from more than one year to more than two years; and provide that leases of an indefinite term will not be deemed to be PPS leases unless and until they run for a period of more than two years.

OUTLINE; Unfair Contract terms

15 September 2017

The ACCC has instituted proceedings against Servcorp Ltd and two of its subsidiaries (Servcorp) alleging that a number of terms in Servcorp's standard form contracts with small businesses are unfair and should be declared void.

https://www.accc.gov.au/publications/unfair-terms-in-small-business-contracts

OUTLINE; Unfair Contract terms

The contract terms which the ACCC alleges are unfair

- automatically renew a customer's contract and allow Servcorp to unilaterally increase the contract price after the renewal and without prior notice to the customer
- permit Servcorp to unilaterally terminate the contract and to impose penalty-type consequences on the customer
- permit Servcorp to unilaterally determine whether the contract has been breached
- permit Servcorp to unilaterally acquire the customer's property without any notice.

Unfair contract laws

But what if the customer doesn't even read the standard form contract?

As Callaway JA said in the Maxitherm case

It is not uncommon to enter into a transaction on another party's standard terms and conditions without enquiring what they are. It is often not worth doing so and a sensible commercial risk to run. The law reflects commercial reality by holding the party who does not enquire to such of the other party's standard terms and conditions as may fairly be regarded as within the risk the first party took.

Central Cleaning Supplies v Elkerton [2015] VSCA 92 (12 May 2015) at [37]

Foreign resident capital gains withholding

The rules apply when:

- an entity (the purchaser) becomes the owner of a Capital Gains Tax (CGT) asset
- at least one of those vendors is a relevant foreign resident at the time
- the CGT asset is a certain type of Australian property or an option or right to acquire such property

Foreign resident capital gains withholding

What are the exceptions?

The purchaser is not required to withhold an amount under these rules if any of the following apply:

- The CGT asset is taxable Australian real property - the market value of the property or interest is less than $750,000.
- The CGT asset is taxable Australian real property - the vendor provides the purchaser with a clearance certificate that they have obtained from the ATO.

Foreign resident capital gains withholding

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Foreign resident capital gains withholding

Reasons for a variation include:

- the vendor will not make a capital gain or not have an income tax liability
- a creditor of the vendor has a mortgage or other security interest over the property, and the proceeds of sale available at settlement are insufficient to cover both the amount to be withheld and to discharge the debt the property secures

Superior Court Decisions

NB2 Pty Ltd v P. T. Ltd [2017] NSWCA 257

18. I consider that the likelihood that the appeal will be rendered abortive if the judgment below is able to be enforced is decisive. As a result, I consider it appropriate to grant a stay (on a judgment against NB2 and the guarantors in the sum of $3,968,848.13).

Superior Court Decisions

10. NB2 and Mr Basile contend that … their appeals will be rendered nugatory if a stay is not granted. … NB2 has liabilities that exceed its assets by more than $11 million, and that Mr Basile has no significant assets. …If PT is permitted to enforce its judgment, it is likely that Mr Basile will be made bankrupt and that an order for the winding up of NB2 will be made. They contend that they would therefore lose control of the appeal, effectively rendering it nugatory.

Superior Court Decisions

Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed) [2017] FCA 914 (18 July 2017)

Orders that Ferrier Hodgson is appointed to:

(a) prepare a limited report for inclusion in the report required to be given to creditors of each of the Ten Group Companies pursuant to section 439A(4) of the Act (the 439A Report), including

(i) any claims arising from the conduct of the directors, officers, advisors (including Gilbert + Tobin) and/or KordaMentha as prospective administrators of each of the Second Plaintiffs prior to the appointment of the First Plaintiffs; and

Superior Court Decisions

Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed) [2017] FCA 914 (18 July 2017)

(ii) whether the remuneration received by KordaMentha in respect of work undertaken by KordaMentha prior to the appointment of the First Plaintiffs are voidable preferences;

"The … work that was performed prior to the administrators' appointment … went on for some three months, and KordaMentha was paid more than $1 million for the work".

Superior Court Decisions

Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed) [2017] FCA 914 (18 July 2017)

(b) supervise the First Plaintiffs' conduct so as to satisfy himself that the First Plaintiffs are acting consistently with their statutory duties and fiduciary obligations as administrators of the Second Plaintiffs in relation to any claims which Ferrier Hodgson identify in the report prepared pursuant to this Order that the Plaintiffs may pursue or should further investigate;

Superior Court Decisions

ARITA Technical Paper

General law independence standards of Australian liquidators and administrators

Mark Wellard, Legal Director, 18 October 2017

"If one were to reduce the judgment of O'Callaghan J in Ten Network to one key statement of principle, it might be the proposition that as a potential administrator, you can 'pre-plan' a process, but you cannot 'pre-pack' an outcome".

Superior Court Decisions

Ramsay Health Care Australia Pty Ltd v Compton [2017] HCA 28

Mr Compton's non est factum defence failed; and, in the absence of any issue as to the quantum of the debt alleged by Ramsay, Hammerschlag J awarded judgment for Ramsay against Mr Compton in the amount of $9,810,312.338 ("the Judgment"), being the amount stated in a Certificate of Debt adduced by Ramsay in accordance with cl 12 of the Guarantee.

Superior Court Decisions

19. At the hearing before the primary judge, Mr Compton sought to rely on a "reconciliation" of the indebtedness between the parties. It was submitted on Mr Compton's behalf that, if accepted, the "reconciliation" established that it was Ramsay that owed money to Medichoice, and not the other way around ("offsets" and "rebates").

Superior Court Decisions

20. The primary judge declined to go behind the Judgment.

28. The Full Court went on to hold that the primary judge erred in focusing on:

"the way in which Mr Compton conducted his case in the Supreme Court rather than on the central issue, which was whether reason was shown for questioning whether behind the judgment there was in truth and reality a debt due to the petitioning creditor".

Superior Court Decisions

54... A Bankruptcy Court is not concerned to prevent the judgment creditor from invoking the ordinary processes of execution available under the general law. Rather, a Bankruptcy Court is concerned with whether the debt on which it is based is truly a basis for the making of a sequestration order. A Bankruptcy Court has a statutory duty to be "satisfied" as to the existence of the petitioning creditor's debt.

Superior Court Decisions

55. The scrutiny required by s 52 as to whether there is, in truth and reality, a debt owing to the petitioning creditor serves to protect the interests of third parties, particularly other creditors of the debtor. It is of critical importance to appreciate that such persons were not parties to the proceedings that resulted in the judgment debt.

Superior Court Decisions

68. Accordingly, a Bankruptcy Court will usually have no occasion to investigate whether the judgment debt is a true reflection of the real debt. But where the merits of a claim and counterclaim have not been tested in adversarial litigation, a judgment debt will not have this practical guarantee of reliability.

Superior Court Decisions

72. The Full Court was correct to conclude that there was a substantial question as to whether the debt on which Ramsay relied was owing. That being so, the Bankruptcy Court should proceed to investigate this question in order to decide whether it was open to it to make a sequestration order.

KIEFEL CJ, KEANE AND NETTLE JJ.

Superior Court Decisions

97. In particular, the power is not confined to circumstances of fraud, collusion, or miscarriage of justice.

EDELMAN J.

Superior Court Decisions

OZ NORTH FOOD & LIQUOR WHOLESALERS (NT) P/L v GRAY [2017] SASCFC 1 (18 January 2017)

Gray v Oz North Food P/L [2016] SASC 165

1. Permission to appeal granted

Superior Court Decisions;

Mr Gray, (as guarantor) could only be said to be contingently indebted on the bankruptcy day on the basis that (his company) Omnyx might, after he had entered into the Part X agreement, make further orders (for goods). The difficulty with that construction is that the authorities are clear that until Omnyx placed its order Mr Gray could revoke the guarantee he made to Oz North Food . It necessarily follows that Mr Gray was not under a continuing legal obligation on which the contingency of the company making an order could operate. It is therefore arguable that only on the subsequent ordering of goods by Omnyx did Mr Gray become indebted to Oz North Food.

Superior Court Decisions; Trusts

Richstar finally put to rest (a decade later)

[26] Usual analysis accepts that the beneficiary or discretionary object under a purely discretionary trust is not someone who has a property interest in the trust property. However, the applicant submits that the law is otherwise if the relevant beneficiary is someone who controls the trust to the requisite degree, relying on Australian Securities and Investments Commission v Carey (No 6)[12] ("Richstar") and Kennon v Spry.

Superior Court Decisions; Trusts

[41] It follows, in my view, that the bankrupt's right as one of the general beneficiaries of the Fairdinks Discretionary Trust did not vest in the applicant as property of the bankrupt within the meaning of ss 5 or 58 of the BA. At best, the applicant's position is a statutory equivalent of an assignee of an expectancy.

Fordyce v Ryan & Anor; Fordyce v Quinn & Anor [2016] QSC 307 (20 December 2016)

Recent Superior Court Decisions; Liquidators & Trusts

The Court in *Independent Contractor Services (Aust) Pty Ltd (In Liquidation) (No 2)* stated that an application would be required for liquidator's fee approval and for a right to distribute trust funds. It also decided that the priority provisions under section 566 of the Corporations Act did **not** apply to these distributions.

In *Bell Hire Services Pty Ltd (in liq)* [2016] FCA 1583 the court agreed that section 556 did not apply to distributions of monies derived from trust assets.

https://www.lawcouncil.asn.au/resources/submissions/law-reform-proposal-trusts

Insolvency Law Reform Act
Panel discussion

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Insolvency Law Reform Act
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Panel:

http://www.corcordis.com.au/profiles/radek-kolman/

https://www.jirschsutherland.com.au/people/peter-moore/

http://obp.com.au/liam-bailey/

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