
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountant

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INSOLVENCY UPDATE

ASIC application for a winding up order

In *ASIC v Neolido Holdings Pty Ltd*, the Supreme Court of Queensland - Court of Appeal considered a series of appeals after the Australian Securities and Investments Commission ("ASIC") had obtained orders to wind up two associated companies.

ASIC had requested the companies to demonstrate their solvency in April 2005. However, there was no response by the time winding up applications were lodged in November 2005. The companies requested an eight week adjournment to obtain an accountant's report which was declined and winding up Orders were made.

On appeal the Court held:

- the evidence that the companies were insolvent was overwhelming;
- if a company was hopelessly insolvent then it should be wound up regardless of whether Receivers and Managers were appointed and regardless of the potential benefit to unsecured creditors;

- the companies had been given ample opportunity to obtain a report as to their solvency, if such a report could be obtained;
- the condition imposed in the winding up order that ASIC paid all the costs of the Liquidator, was apparently made under the assumption that the Liquidator may incur costs pursuing insolvent trading proceedings. However, such a consideration was not relevant to the discretion to allow ASIC to apply for a winding up Order; and,
- even if that was not the case, a Liquidator would only pursue an insolvent trading claim for the benefit of the creditors, in which case it was appropriate that the companies bore the costs.

The winding up orders were confirmed, and the condition that ASIC meet the Liquidator's costs was removed.

Special Purpose Administrator

In *Honest Remark Pty Limited v Allstate Explorations NL* the Supreme Court of New South Wales considered the appointment of a Special Purpose Administrator to a company subject to a Deed of Company Arrangement.

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A shareholder asked the Court to make the appointment to enable the investigation of specific transactions during the Voluntary Administration and Deed of Company Arrangement. Prior to the trial, the Deed Administrators requested the Court to summarily dismiss the application. The Deed Administrators argued that the Court did not have jurisdiction to make such Orders.

The Court held that:

- although the transactions had already been reviewed by ASIC, the outcome of the ASIC investigation did not by itself prove that the shareholder's concerns were unfounded;
- the key issue was whether the Court had the power to appoint a Special Purpose Administrator for the purpose of investigating the Administrators' and then Deed Administrators' conduct;
- there was no comparable precedent of the appointment of a Special Purpose Liquidator to investigate the conduct of a Liquidator. This was because investigation of the conduct of a Liquidator was a supervisory function of the Court that should not be delegated. There was no reason to believe that the position would be any different in respect of an Administrator or Deed Administrator; and,
- even if the Court did have power to make such an order, there were alternative remedies that were more appropriate.

The Deed Administrators' attempt to have the application dismissed summarily was successful.

Setting aside a Liquidator's settlement

In Spalla v St George Motor Finance Ltd (No. 7) a director asked the Federal Court of Australia to set aside a Deed of Settlement entered into by a Liquidator, arguing that the Liquidator had acted in bad faith.

The Liquidator had become a party to legal proceedings against a secured creditor and the Receivers and Managers it had appointed. The litigation had been funded by a specialist litigation funder under an agreement which had been approved by the Court. The agreement required the director to assist with funding.

However, the Liquidator encountered difficulties in conducting the litigation within the agreed framework. The Liquidator then received advice that the litigation funding would be withdrawn. The Liquidator attempted unsuccessfully to arrange alternative sources of finance, including from the director.

The Liquidator then commenced negotiations with the secured creditor and the Receivers and Managers. The Liquidator accepted an offer that allowed him to withdraw from the litigation, bearing his own costs.

The Court held that:

- there were significant problems with the claim as, evidenced by 10 revisions to the Statement of Claim, which had also been struck out three times;

- the legal fees and other costs meant that the proceedings would not produce a return for unsecured creditors, unless at least \$3 million was recovered;
- the Liquidator had tried and failed to find an alternative financier. The Liquidator was prepared to continue the litigation but the director was unable to provide the funds for him to continue;
- the question for the Court was not whether the Liquidator made the best decision in the circumstances, it was whether he had acted so unreasonably that the Court should set aside his actions;
- the Liquidator did not act under duress and was not influenced by any improper pressure. The contention that the Liquidator acted dishonestly was rejected; and,
- the settlement provided a clear benefit to the company by providing a release from all parties, specifically including Costs Orders.

In the circumstances, the Liquidator had acted reasonably and the settlement should not be disturbed.

When was the offer accepted?

In Hinkley v de Vries (No. 2) the Supreme Court of New South Wales was asked to consider when an offer had been accepted for the extension of a lease of a taxi plate.

A lessee did not give notice of an intention to extend the lease within specified notice period. The lessor then wrote to the lessee advising that he was unsure of the lessee's intentions and that the lessor had

prepared a new lease, if the lessee wished to continue the lease. That letter included a draft agreement and sought a response by 11 July 2006, at the latest. The draft agreement included a commencement date in August 2006, and provided for a bond of \$2,460.

The lessee responded by telephone on 11 July 2006, which led to lessor forwarding another letter, which enclosed a revised lease agreement. That second version of the agreement included a September 2006 commencement date and a *different* bond of \$2,640.

One month later the lessor had still not received a signed lease agreement from the lessee. On 14 August 2006 the lessor sent a letter to the lessee advising that he was terminating the lease.

On 15 August 2006 the lessee forwarded to the lessor a signed, witnessed lease agreement being the earlier version, which provided for an August 2006 commencement.

On 16 August the lessee received the letter of termination. No earlier than 17 August 2006 the lessor received the signed lease agreement.

The Court held that that the postal acceptance rule, which results in acceptance as soon as a letter is posted, did not apply because the letter of 11 July 2006 specifically required the lessor to actually receive the duly executed agreement. It was clear that the lessor did not intend that his offer might be accepted simply by posting an executed agreement.

The 14 August 2006 termination was effective and the lease would not be extended.

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