
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountant

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INSOLVENCY UPDATE

Can a photocopy of a Bankruptcy Notice constitute effective service?

In *Mineo v Etna* a bankrupt asked the Federal Court of Australia to set aside a Sequestration Order made against him on the grounds that the Bankruptcy Notice served on him was a photocopy not an original, as required.

The petitioning creditor argued that service of a photocopy was sufficient to comply with the law, but that in any event, the document served was in fact an original.

The Court held that:

- a Bankruptcy Notice can be served by post or courier on a debtor, left at the debtor's last-known address, personally delivered or sent by facsimile transmission or other mode of electronic transmission, such as email;
- it was not essential that an Original Bankruptcy Notice be served on a debtor; and,

- a debtor would in fact have no way of knowing whether a Bankruptcy Notice effected by facsimile transmission or email was a copy or an original. It would be an absurd construction of the *Bankruptcy Act* and *Bankruptcy Regulations* to require that the debtor receive an original notice in some circumstances but not in others.

The bankrupt was unsuccessful.

Cost of realising secured property

In *Bray v Dye* two secured creditors asked the Supreme Court of Victoria to make Orders requiring the Liquidators of a company to pay them the proceeds of asset realisations, less any adjustment for preferred unsecured creditors in respect of employees' entitlements.

The secured creditors did not challenge the Liquidators' entitlements to their costs, expenses and remuneration but stated that the Liquidators were obliged to establish their claim and had failed to do so.

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The Liquidators argued that they were entitled to costs and expenses, reasonably incurred, in the care, preservation and realisation of the property or alternatively as remuneration for work done to convert assets into cash under the well-established principle in *Re Universal Distributing Co Ltd*. They also relied upon a Deed of Priority executed by one of the secured creditors, in which he agreed to subordinate his rights to the rights and claims of the Liquidators.

The Court determined that:

- the secured creditors should have put the Liquidators on notice of the challenge to their claim, so that they could address the issue in their evidence;
- the secured creditors' allegation of conversion of the proceeds from the realisation of assets was misconceived. It required the Court to find that the Defendants had converted an amount that would only be determined after the Liquidators' claim for remuneration and expenses had been established;
- the role of one of the secured creditors was at best, uncertain because she did not give evidence and the Liquidators could only communicate with her through the other secured creditor; and,
- the secured creditors were bound by the terms of the Deed of Priority which provided the Liquidators with an indemnity for liabilities, including remuneration incurred during the winding-up, so their claims for remuneration during the period of their administration were soundly based.

The Plaintiffs were unsuccessful.

Resignation of Administrators

In *Carrello v Aluminex Resources Ltd* the Administrators of a company asked the Supreme Court of Western Australia to consider whether they had been validly appointed.

Two of the four directors of the company claimed that the resolution purporting to appoint the Administrators was invalid because a majority of directors had not supported the resolution. Even if the resolution was valid, they argued, the administration should end because the company was solvent.

By the time of the hearing, the Administrators had resigned and the two directors and the former Administrators had agreed that the Application should be dismissed, with no Order as to costs.

However, the two directors who voted in favour of the appointment of the Administrators asked the Court to adjourn the Application to allow them to consider their position and whether to appoint a Provisional Liquidator to the company.

The Court held that:

- the Application should only be dismissed if the Court could be satisfied that the dismissal of the application would not irreversibly prejudice any party;
- the interests of creditors should be considered in determining what Orders were appropriate;
- the former Administrators no longer represented the creditors of the company; and,

- it was appropriate to dismiss the Application.

However, the directors were required to advise creditors, in writing, that the Administrators had resigned. The letter should also explain that the convening period had previously been extended and that creditors had the right to seek an Order for the appointment of replacement Administrators.

Administrator's equitable lien

In *Coad v Wellness Pursuit Pty Ltd (In Liquidation)* an Administrator asked the Court of Appeal of the Supreme Court of Western Australia to make Orders that his equitable lien over the assets realised in the administration ranked ahead of a fixed charge.

There were three registered charges over the company's assets. None of the chargees appointed a Receiver and Manager, during the administration or the liquidation.

The Administrator had negotiated the sale of the company's business at a price sufficient to pay out the first and second-ranking chargees. However, the proceeds were insufficient to payout the third-ranking chargee and the Administrator's costs, in full. The third ranking chargee consented to the sale on condition that the balance of the sale proceeds would be held on trust, pending resolution of the dispute.

At the original hearing the Court approved the amount of the Administrator's remuneration but refused to Order that it be paid from the trust fund because it was secured monies subject to the third ranking charge, which had priority.

The Liquidator argued that at the first hearing the Court should have found he had provided an incontrovertible benefit to the company, so that he was entitled to priority. The third chargee contended that regardless of incontrovertible benefit, it was still the case that any equitable lien could not take priority over a fixed charge.

The Court held that:

- in addition to a statutory indemnity and statutory lien under Sections 443D and 443F of the Corporations Act, a Voluntary Administrator has a separate and distinct entitlement to an indemnity in equity out of the company's assets, which is secured by a equitable lien;
- an Administrator's equitable lien for properly incurred remuneration, costs and expenses attributable to work done exclusively in preserving and realising the company's assets, will have priority over a prior fixed charge. The charge holder would be acting unconscientiously if it was to assert priority over the assets realised by the Administrator, without the relevant remuneration, cost and expenses being paid; and,
- the third ranking chargee had knowledge of the Administrator's appointment and his plans to realise the company's assets. It had refrained from appointing a Receiver and Manager, thereby avoiding the otherwise necessary costs of a Receivership and the charge holder would be acting unconscientiously to allow it to now assert priority.

The Administrator was successful.

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