
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountant

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INSOLVENCY UPDATE

Directors' penalty notice

Directors' penalty notices are issued by the Australian Taxation Office ("ATO") pursuant to Section 222 AOE of the Income Tax Assessment Act 1936 (Cth.) to recover taxation debts owed by companies. On receipt of such notices, the directors have 14 days to pay the debt in full, negotiate a payment schedule, or arrange for the company to be wound up or placed into administration pursuant to Part 5.3A of the Corporations Act. Otherwise the directors will become personally liable for the amount of the debt detailed in the notice. If the company does not comply with the provisions of a payment arrangement, then the directors become personally liable for the amount of the unpaid debt.

Ross Forsyth v Deputy Commissioner of Taxation is the most recent of a long list of cases in which directors have tried to escape the effect of the directors' penalty notice regime. In this case, three notices had been issued. The director argued that each notice was invalid.

The first notice was said to be invalid because it only detailed debts covering two months, when in fact the overall debts owed to the ATO were

considerably more. The director argued that because of that misstatement he was induced to attempt to arrange a repayment program rather than cause the company to enter liquidation or administration.

The director argued that the second and third notices were tainted by the error said to exist in the first notice. The director also argued that there had been insufficient evidence that the notices had been served by post in the manner required by the legislation.

The Court of Appeal of New South Wales held that:

- notices were issued to directors, who normally had access to the financial information of the company;
- the first notice was not inaccurate. It correctly represented the debt owed in respect of the two months to which it referred;
- the absence of information about debts in respect of other period, to which the notice did not refer, did not render the first notice invalid;
- there was no linkage between the first notice on the one hand and the

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second and third notices on the other. For this reason, it was difficult for the Court to accept that a theoretical invalidity of the first notice could infect the second and third notices; and,

- the evidence of the officer of the ATO was that the notices had been posted in accordance with the ATO procedure. It was not necessary for the ATO to provide a detailed confirmation that each step had been strictly complied with.

The director was unable to escape personal liability.

Dealing with real estate agent's trust account

The Property Agents and Motor Dealers Act 2000 (Qld) requires corporate real estate operators to have at least one licensed real estate agent as a director. When the director of a small real estate agency died, his spouse ran into difficulties arranging a licensed replacement. This was because the company had considerable unpaid taxation liabilities, which could potentially be imposed upon a newly appointed director, via the directors' personal liability notice regime. To resolve the impasse, the surviving director arranged the appointment of a Provisional Liquidator, who negotiated the timely sale of the company's property management business. The sale price was based on the number of existing clients that transferred their business to the purchaser.

However, the Provisional Liquidator formed the view that his appointment did not authorise him to make payments from the company's trust account. This affected the sale, because there was the risk that

property owners would take their business elsewhere to avoid the possibility of further delays.

The Supreme Court of Queensland recognised the practical difficulties, and appointed the Provisional Liquidator as Receiver of the trust account.

In that capacity, the Receiver sought guidance from the Court as to the disbursement of the trust funds.

In *Wicks v Michael Giles Real Estate Pty Ltd (In Liquidation)* the Supreme Court determined that:

- the Property Agents and Motor Dealers Act, meant that trust funds could only be paid to the property owners;
- the Act did not provide for the payments of any remuneration or reimbursement of expenses, beyond the payment of the commission, to which the real estate agent would ordinarily be entitled;
- the expenses of the Receiver should be given the same priority in the winding up as the expenses of the Provisional Liquidator; and,
- the remuneration of the Receiver should be given the same priority in the winding up as the remuneration of the Provisional Liquidator.

Managed investment scheme wound up

In *Altmann & Ors v FN Management Pty Ltd* the Supreme Court of Queensland was requested to wind up a managed investment scheme. Under the scheme, investors owned individual units in a Queensland holiday resort. A company associated

with the promoters of the scheme owned the reception area, the restaurant and various other common areas. That company also conducted the management of the accommodation units owned by investors, in return for a fee.

The strategic importance of the common areas was recognised by the promoters. Various documents included undertakings that they would agree to the sale of the common areas, at fair value, if the manager's appointment was terminated by a majority of investors. In due course, a majority of investors terminated the manager's appointment. Rather than cooperate with a transfer to a new manager, the management company purported to lease parts of the common areas to associated entities on terms which the Court found was not commercially practical. The unhappy investors then requested the Court to wind up the scheme, arguing that this was in breach of undertakings in the promotional documents. The management company argued that the terminations had left the scheme without any substance whatsoever, with the result, that there was nothing left to wind up.

The Court ruled that:

- the fact that the investors might be pursuing other remedies in other proceedings did not preclude them from seeking to have the scheme wound up;
- the benefits arising from occupancy of the common areas were property for the purpose of the legislation, so it was incorrect to say that the scheme had ceased to exist and had no assets or liabilities;

- the Court had wide discretion in such applications;
- it was not appropriate for the management company or associated entities to enjoy benefits arising from the promotion of an illegal scheme; and,
- winding up the scheme was necessary to ensure that the interests of the investors were properly protected.

Ansett pilots' superannuation

In *Clark v Korda* the Federal Court of Australia was asked to consider the redundancy entitlements payable to pilots employed by the airline.

The Deed Administrators argued that the pilots' entitlements were capped by the relevant enterprise bargaining agreement ("EBA"). The pilots disagreed. They argued that a company policy which, they said, recognised that some employees would be theoretically worse off under the EBA, guaranteed those affected employees the option to choose the redundancy program that offered the greatest overall benefit. The Deed Administrators recognised the operation of the policy but argued that it had never been intended to apply to the pilots and did not apply to them.

The Court ruled that the EBA may have purported to replace earlier redundancy regimes but it did not actually exclude their operation. It further held that the plain words of the policy did not exclude the pilots and there was nothing to suggest that the policy did not apply to the pilots. The pilots were successful.

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