
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountant

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INSOLVENCY UPDATE

What happens to the deposit?

The Receiver and Manager of a company negotiated the sale of a company's business to a purchaser. On the settlement date, the intended purchaser ("the purchaser") negotiated a 33 day extension. Then on the extended settlement date the purchaser sought a further three month extension of the settlement date. There were various further negotiations, which ultimately resulted in a new settlement date and an agreement for the proceeds of a major contract to be paid to the Receiver and Manager, within three days of receipt and treated as part-payment of the purchase price. In previous proceedings the purchaser had been able to have the contract set aside as being void under the South Australian *Land and Business (Sale and Conveyancing) Act 1994*, which prohibits payment of the purchase price, prior to settlement.

In *Ethnic Earth Pty Ltd v Quoin Technology Pty* the Supreme Court of South Australia was then asked to decide what should happen to the monies that had already been paid under the now void contract.

The Court held that:

- the purchaser had decided that it no longer wished to proceed with the sale contract;
- to that end, the purchaser's solicitor had successfully negotiated an instalment arrangement which he knew would almost certainly be void, to assist his client to avoid forfeiture of the moneys paid;
- in addition, the solicitor was clandestinely negotiating with the major client to enter into a fresh contract with the purchaser;
- any claims for recovery of moneys paid under a contract rendered void by the legislation should be determined in accordance with the common law principles of restitution applicable generally to contracts avoided at common law;
- to make a successful claim on the basis of unjust enrichment, the purchaser must establish a mistake or demonstrate that recovery was consistent with an evident legislative policy;
- in this case, the purchaser could not prove that there had been a mistake at the time of making the payments, as the payments were made under what was then a valid

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and binding obligation. The legislation was intended to protect purchasers from paying money to a vendor that was unable to complete an effective transfer. On the facts, the purchaser was not in that situation, so retention by the vendor, would not be inconsistent with legislative policy; and,

- there had been significant performance of contractual obligations and so it could not be said that there had been a total failure of consideration.

The Court declined to make an Order for the refund of the \$150,000 to the purchaser.

Setting aside a sequestration order

Vaucluse Hospital Pty Ltd v Phillips dealt with a bankrupt's application to have a Sequestration Order set aside.

A debtor had serious injuries, which left him unable to properly manage his personal and financial affairs. The debtor incurred a debt to a private hospital. The debtor believed that his health insurance would pay the debt. However, as he discovered when his Bankruptcy Trustee delivered formal notices, the insurer declined the claim and the hospital commenced legal action that resulted in his bankruptcy.

The bankrupt's father paid the hospital bills together with the hospital's legal fees which together totalled more than \$9,000.

The bankrupt then asked the Federal Magistrates Court to review the Registrar's decision to make the Sequestration Order. The bankrupt advised the Court that he had no liabilities, other than a mortgage that was paid up to date, and that his

assets included a one-third interest in a \$500,000 residential property, jointly owned with his father and brother.

The Court held that:

- it was clear that the bankruptcy should be brought to an end. The question was whether the Sequestration Order should be set aside as a result of a Review Order or annulled, in which case the bankrupt would be required to pay the fees and expenses of the Trustee;
- Trustees face an inherent risk of unpaid remuneration for work performed in the 21 day period during which an application for review of a Sequestration Order can be made;
- a Trustee should exercise care about the work undertaken during the 21 day period. Indicators of circumstances warranting caution for Trustees included:
 - (i) a Sequestration Order made with respect to a relatively small debt;
 - (ii) a Sequestration Order made when the debtor was absent;
 - (iii) a debt not incurred in the course of business or commercial dealings; and,
 - (iv) a bankrupt who owned significant assets, such as a home.
- if the Trustee had proceeded cautiously then, only a few expenses would have been incurred; and,

- in this case there was no flagrant, reckless or negligent disregard of Court process and there was no collateral advantage to the bankrupt.

In all the circumstances it was appropriate to set aside the Original Order, with the effect that the bankrupt was not required to pay the Trustee's fees.

Approval of Liquidator's remuneration

In *Australian Securities & Investments Commission v Rowena Nominees Pty Ltd* the Supreme Court of Western Australia was asked to approve a Liquidator's claim for remuneration.

The Liquidator was initially appointed as the independent accountant of a trustee company pursuant to an enforceable undertaking given to the Australian Securities and Investments Commission. He was later appointed as Provisional Liquidator and subsequently Official Liquidator. He was then appointed as Supervisor under the provisions of the *Finance Brokers Control Act 1975 (WA)*. The State of Western Australia was responsible for his remuneration incurred in his capacity as Supervisor, which was scrutinised by probity auditors, prior to payment.

The remuneration application was opposed by a group of investors and by the Liquidator of a company that was a significant creditor. The Objectors argued that the Liquidator should not be paid anything for the work done in preparing his accounts for submission to the probity auditors, because it was not part of his functions as Liquidator and related to his work as Supervisor.

The Objectors also argued that much

of what the Liquidator did was of no real benefit to the creditors, that many of his actions were misconceived or unnecessary and that he had used what was described as a "Rolls Royce approach".

The Court held that:

- the winding up was very difficult, complicated and extremely messy;
- based on affidavit evidence the Liquidator appeared to have undertaken his task as Liquidator with diligence and with attention to detail. However, aspects of the Liquidator's conduct were of concern, for example, the conduct of what the Liquidator described as test cases that, in the Court's view, were not;
- excessive restrictions on fees might discourage Liquidators from taking on difficult liquidations. However, creditors had to be protected from a "snout in the trough" approach;
- the creditors' refusal to approve his remuneration was not decisive but was one factor to be taken into account;
- the Liquidator should not be allowed any additional remuneration for acting as Supervisor or for preparing accounts for review by the probity auditor;
- the Liquidator's work since the termination of his position as supervisor was the work of a Liquidator, but the Court could not be satisfied that it had always been conducted to the benefit to the creditors.

In all the circumstances, it was

appropriate to fix the Liquidator's remuneration in the amount of \$200,000, significantly less than the \$597,000 sought.

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