
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountant

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INSOLVENCY UPDATE

Liquidator's lodestar

In *Cauchi v Exismart Pty Ltd (in liquidation)* a Liquidator asked the Supreme Court of Victoria to approve an increase in his remuneration.

A creditors' meeting had originally approved Liquidator's remuneration which was capped at \$25,000, calculated on a time basis according to a schedule of hourly rates, plus G.S.T.

By the time the liquidation was finalised, the Liquidator's accrued remuneration amounted to \$56,622, plus G.S.T. The Liquidator had convened a creditors' meeting to consider a resolution to approve additional remuneration. However, there was no quorum at either the initial meeting of creditors or at the reconvened meeting. Accordingly, the meeting lapsed. The Liquidator then applied to Court for approval of his fees.

The Court held that:

- it should follow *Re Stockford Pty Ltd* by first setting a lodestar amount, which was calculated as the number of hours reasonably spent by the insolvency practitioner multiplied by a reasonable hourly rate;

- the lodestar amount should then be adjusted to reflect other factors, such as the quality of the work performed, the complexity of the liquidation over and above the normal complexity of such work, the novelty and difficulty of the issues that confronted the Liquidator, as well as the ultimate result obtained by the Liquidator;
- although summarised in very succinct terms, the information provided by the Liquidator to the Court showed that the work was necessary and delegated to junior staff, where appropriate. The hourly rates charged were within the general range of hourly charges of other insolvency practitioners within the Melbourne area. This was sufficient to establish the lodestar amount;
- the Court noted that the liquidation did not appear to have been particularly complex. The Liquidator had sold plant and equipment and had recovered an unfair preference from the Australian Taxation Office. There had been no requirement to trade-on the company and there was no evidence that the liquidation involved any degree of commercial risk or responsibility, which was out of the ordinary; and,

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- in the absence of additional complexity or risk, prima facie, the lodestar amount should be reduced by 10%. However, such a reduction should not be made, as the Liquidator had sought approval from the Court of remuneration limited to \$50,000, plus G.S.T. This was 11.7% less than the total time costs recorded by the Liquidator.

Captured by a charge?

A borrower company, which was in liquidation, commenced legal proceedings against its secured creditor and the Receivers and Managers who were appointed by the secured creditor. The borrower was successful in its claim against the secured creditor for acting in contravention of certain letters of support, by appointing Receivers and Managers. The borrower was unsuccessful in claims against the Receivers and Managers for trespass and conversion. Each party then appealed.

The Receivers and Managers settled the claim against them, by paying the negotiated sum of \$1.25M to the borrower.

The secured creditor's appeal was successful and it sought payment of the settlement sum, only to discover that the funds had already been paid to the petitioning creditor, which had funded the original legal proceedings and had indemnified the Liquidator.

In *Re Newtronics Pty Ltd (in liquidation)* the Supreme Court of Victoria considered whether the settlement sum was subject to the secured creditor's charge or whether it was secured in its entirety by the Liquidator's equitable lien and hence available for payment to the indemnifying creditor.

The Court held that:

- the settlement sum was realised in the winding up and the Liquidator was entitled to payment of his costs, expenses and remuneration for the work performed by the Liquidator for the exclusive purpose of recovering the settlement sum, as an asset of the company;
- a submission that the legal proceedings were brought, in substance, by the indemnifying creditor could not be accepted. The Liquidator's decision to pursue the claim was consistent with his statutory obligations;
- it would be unconscionable for the secured creditor to take advantage of the fund created by the Liquidator, in the course of the performance of his duties as Liquidator, without allowing the Liquidator to have his costs and expenses paid from that fund, regardless of whether the secured creditor had consented to the Liquidator's actions or not; and,
- it was irrelevant that the fund created by the Liquidator would not actually benefit the secured creditor.

The secured creditor's application to bring the settlement sum within the scope of its charge was unsuccessful.

Payment into Court an unfair preference?

In *Great Wall Resources Pty Ltd (in Liquidation) v Davidovic Pty Ltd* the Supreme Court of New South Wales was asked to determine whether a payment into Court, made during the relation back period, was an unfair preference recoverable by a Liquidator pursuant to Section 588FA of the *Corporations Act*.

The Court had Ordered a firm of solicitors to produce the files of a former client, subject to the client company paying \$44,969 into Court. This represented the client's unpaid legal fees. The solicitor claimed a lien over the files.

The payment into Court was made on 25 August 2010, from part of the proceeds of the sale of a property owned by the sole director/shareholder and his wife. On 7 December 2010 a winding up Order was made and the company went into liquidation.

The solicitors argued that their claim was that of a secured creditor because of a possessory lien. Therefore, the payment could never be an unfair preference as they were not unsecured creditors.

The Court held that:

- the money came from the sale of the director's and his wife's property and prima facie the funds belonged to them. However, the company received the money as a loan and the funds then became property of the company;
- prior to payment into Court the solicitors held a possessory lien over its client's files, which crucially was a right in property, rather than a right of action. Therefore, the solicitors could not be a secured creditor, prior to the payment to Court; and,
- it was the payment into Court which created the security. As the payment was within the six month relation back period, the payment, which created the security, was void against the Liquidator.

The solicitors were unsuccessful.

Remuneration for Trustees of a creditors' trust

A creditors' trust is sometimes used to terminate a Deed of Company Arrangement ("DoCA") earlier than would otherwise be the case. Typically the former Deed Administrator becomes the Trustee. It allows the Trustee to realise assets for the benefit of the creditors of the company, whose claims are novated from the company to the creditors' trust. The early termination of the DoCA is often used to facilitate the relisting of publicly listed companies, whose shares are suspended from trading pursuant to stock exchange listing rules, whilst subject to an insolvency administration. Creditors' trusts are a relatively new device and the law is still developing.

In *Re Creditors' Trust of Jackgreen (International) Pty Ltd* the creditors' trust deed provided that termination of the trust was subject to the payment of all remuneration and costs of the Trustees. The Trustees were entitled to draw their remuneration and costs up to the limits approved by a meeting of creditors or by the Committee of Inspection.

However, the actual remuneration of the Deed Administrators and the Trustees significantly exceeded the amount approved by creditors. The Trustees then asked the Supreme Court of New South Wales to make an Order approving additional remuneration.

The Court held that:

- the *Trustee Act 1925 (NSW)* provided for an application by Trustees to the Court for directions on any question in respect of the management or administration of the trust property or the interpretation of the trust instrument. Therefore, there was no doubt that the Court had

jurisdiction to approve the payment of remuneration of the Trustees;

- the parties' intention appeared to have been to remunerate the Trustees, in full, for the work they performed. However, this was unworkable because a creditors' trust deed had been executed and the DoCA had terminated. Because the DoCA was terminated there was no longer any Committee of Inspection to approve the remuneration of the Trustees. Further, because the DoCa was terminated it was also not possible

for creditors to approve the Trustees' remuneration at a meeting of creditors; and,

- the Trustees should not be put in the position of having to collect and distribute more than \$1M to the beneficiaries of the trust, without being paid for their services. The Court had inherent jurisdiction under the *Trustees Act* to Order their remuneration.

The Trustees were successful in obtaining an Order from the Court for the payment of additional remuneration.

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