



1.0 INTRODUCTION

Two decisions from the Supreme Court of New South Wales may be of interest to some readers. Although these decisions have been much commented upon within the insolvency industry, we have noted that the implications of these decisions may not have been broadly disseminated to others. The most recent decision pertained to the winding up of a corporate trustee, the result of which potentially exposes directors to significant personal liability. The second decision impacts on secured creditors when a company over which it holds security enters into voluntary administration.

2.0 WINDING UP A CORPORATE TRUSTEE

Independent Contractor Service (Aust) Pty Limited (In Liq) ("ICS") (No 2) [2016] NSWSC 106

Readers may recall that in April 2015, we published an article about two conflicting decisions pertaining to the winding up of a corporate trustee. One of those decisions was handed down by his Honour Brereton, J. The decision in ICS flows on from his earlier judgement.

2.1 The Facts

ICS acted as trustee of the Independent Contractor

Services Trust ("**the ICS Trust**") that carried on a labour hire business. Following the completion of an audit, the Australian Taxation Office raised significant debts against ICS and as a result an administrator was appointed to ICS and it was subsequently wound up. The Administrator/Liquidator realised assets of the ICS Trust in the course of completing his duties. The ATO lodged a proof of debt in the winding up for \$11.594M which included a priority claim of \$2.274M in respect of unpaid superannuation guarantee charge. The Liquidator applied to the Court for numerous orders and directions but relevantly, directions were sought as to:

- (i) the manner in which monies were to be distributed;
- (ii) the liquidator's entitlement to remuneration.

RECENT CASE LAW DEVELOPMENTS MAY HAVE SIGNIFICANCE FOR DIRECTORS & CREDITORS

2.2 The Distribution of Trust Assets

His Honour Brereton J found that section 556 of the Corporations Act ("**the Act**"), which sets out the order of priority for the distribution of monies realised from the assets of liquidated companies, does not apply to distributions from the proceeds of trust property. Although conceding that the law in relation to the distribution of trust property was not settled, Brereton J reasoned that the creditors of the trust should rank equally in the distribution of trust property. In any event, he said that in this particular case, even if subsection 556(1)(e) of the Act applied, the superannuation guarantee charge would not rank in priority as the contractors engaged by ICS were not its employees.

2.3 Remuneration

A liquidator of a company that is the trustee to a trading trust is entitled to be paid his or her costs and expenses. Approval of remuneration is ordinarily sought from creditors by liquidators pursuant to either section 473 or 499 of the Act. However, His Honour effectively said that these sections apply to company property only. Consequently, a liquidator of a trustee company must have his remuneration and disbursements approved by the Court if they are to be paid out of the realisation of trust property.

2.4 Implications for Trustees & Directors

This decision may potentially impact upon directors of trustee companies in circumstances where superannuation or other employee entitlements remains unpaid at the date of the trustee company being wound up. Previously, we have published articles about the potential exposure of directors who do not properly manage the solvency or statutory compliance (superannuation, PAYG withholding) of their companies and become the subject of director's penalty notices ("**DPN**") issued by the Australian Taxation Office ("**ATO**") or other liabilities for breach of duty including the duty to prevent the company from trading whilst insolvent.

A director's capacity to recover monies paid to the ATO under the DPN regime in respect of a company's debts may be restricted in circumstances where employees remain unpaid on finalisation of the winding up of a trustee company as a result of the distribution of trust assets amongst trust creditors equally without regard to the priority usually afforded employee creditors. The failure of directors to ensure employee creditors are not disadvantaged may also exacerbate the negative impact of having breached their statutory and fiduciary duties to employees, creditors and other beneficiaries. As such, the decision highlights the importance of directors acting in this dual capacity to ensure that all employee entitlements are paid in full prior to winding up or replacing a corporate trustee.

3.0 SECURED CREDITORS AND VOLUNTARY ADMINISTRATION

Bluenergy Group Limited (Subject to Deed of Company Arrangement DOCA) (Administrator Appointed) ("Bluenergy") [2015] NSWSC 997

3.1 The Facts

Until recently, when a company went into administration and a Deed of Company Arrangement ("**DOCA**") was propounded, it was generally accepted that secured creditors would not be bound by the terms of the DOCA unless they voted for it. This allowed companies to manage their unsecured creditors without impacting on the rights of parties to whom the company had granted securities. However, for the first time since the introduction of Part 5.3A of the Act, the generally accepted practice that secured creditors would not be affected by DOCA agreements has been fundamentally altered.

In this case, Keybridge Capital Ltd ("**Keybridge**") had advanced \$300,000 to Bluenergy Group Ltd ("**Bluenergy**") and was granted a second ranking circulating security interest in the assets of Bluenergy. In April 2014, voluntary administrators were appointed to Bluenergy. At that time, Keybridge was owed approximately \$1.3 million.

RECENT CASE LAW DEVELOPMENTS MAY HAVE SIGNIFICANCE FOR DIRECTORS & CREDITORS

A DOCA was approved by the creditors of the Company and executed on 18 August 2014. The DOCA provided that all creditors' claims were extinguished at the commencement of the deed. Keybridge did not participate in the voting as was standard practice for a secured creditor who did not intend to be bound by the terms of the DOCA.

On 19 March 2015, Keybridge appointed an administrator to Bluenergy pursuant to section 436C of the Act. The administrators of the DOCA objected to this appointment on the grounds that the DOCA had extinguished the debt owed to Keybridge. As such, the deed administrators argued that Keybridge was unable to appoint an administrator and that the appointment of the administrator be terminated.

Keybridge defended its actions on the grounds of subsection 444D(2) of the Act, which states in part that a deed "does not prevent a secured creditor from realising or otherwise dealing with the security interest". The exception to this provision of the Act is if the secured creditor had voted for the DOCA or the court has ordered otherwise.

3.2 Findings in relation to Secured Creditors Rights

His Honour Black J found that:

- (i) the DOCA extinguished the personal interest of Keybridge in the secured property (that is the debt owed by Bluenergy) in accordance with section 444D(1) of the Act by force of the release contained in the deed which took effect from the date of its execution;
- (ii) by reason of Keybridge abstaining from voting, that release was subject to the preservation of the ability of Keybridge to realise or otherwise deal with its proprietary interest in the property that was subject to its security immediately prior to the release of claims effected by the DOCA;

- (iii) even though Keybridge was entitled to appoint an administrator, the appointment should be terminated as it frustrated the purposes of Part 5.3A in that it was likely prejudicial to the interests of creditors who had approved the DOCA and in any event, there was no utility in its continuance as the only debt owing in the subsequent administration was the previous administrator who opposed the second appointment in circumstances where the debt to Keybridge had been extinguished.

In summary, the effect of the DOCA in these circumstances was to extinguish the debt owed by the Company to its secured creditor without compromising the rights that the secured creditor held over the property of the Company the subject of its security. Although it was entitled to appoint an administrator to the Company, there was no point in doing so as it was effectively no longer a creditor of the Company and the only remaining creditor of the Company opposed the appointment.

3.3 Implications for Secured Creditors

This decision has serious implications for secured lenders and will probably result in secured creditors becoming more interventionist in DOCA negotiations, particularly in relation to release provisions which often do not become effective until conclusion or effectuation of the DOCA. It could also result in secured creditors seeking to block approval of DOCA proposals or exercising rights to appoint a receiver and manager.

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