

CITY INSOLVENCY

DISCUSSION GROUP

Wednesday, 5 June 2019

TOPIC

Insolvency & Restructuring
Year in Review – FY 2018/19

PRESENTED BY

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Insolvency & Restructuring Year in Review - FY2018/19

City Insolvency Discussion Group

Perth

5 June 2019

Our team

- Partners



Alison Robertson



Richard Johnson

- Senior Associates



Tom Langdon



Cassie Guy

- Special Counsel



Carmen Boothman

- Lawyers



Tanika Matic



Nikki Ciavatta

Our team

- Paralegal
 - Linda Pearson
- Law Graduate
 - Rozita Jahangirian
- Administrative Team
 - Katelyn Stokie
 - Helen McCann

Developments in 2018/19

Holding
DOCAs...the High
Court speaks

Director
Identification
Number proposals

Proposed phoenix
reforms

Commencement
of related party
voting reforms

Activism from
ASIC: *Traditional
Therapy Clinics*

Administrator liens
and limitations:
Mossgreen Pty Ltd

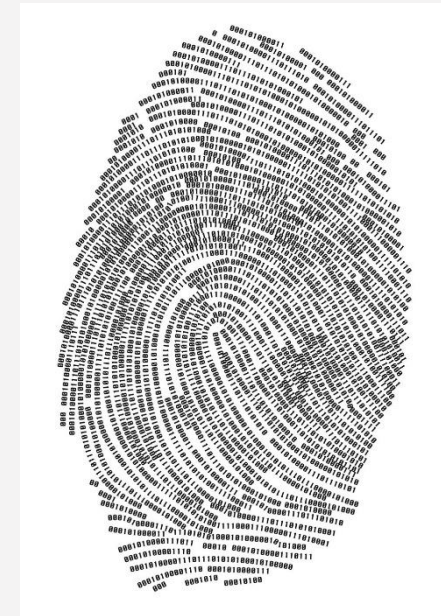
Circulating asset
distributions: *RWE
Robinson*

Examinations in
private: *GH1 Pty
Ltd*

More FEG activism
on circulating
assets: *Jacobs v
Hughes*

Director Identification Numbers

- *Treasury Laws Amendment (Registries Modernisation and Other Measures) draft Bill*
- Introduced to parliament on 13 February 2019
- Proposes the introduction of director identification numbers (DINs) to combat illegal phoenixing behaviours and other director misconduct
- Aims to make directors and their relationships more traceable
- Would mandate that directors apply for a DIN within 28 days after becoming a director or within 15 months after commencement for existing directors



Combating phoenix activity

- *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill* introduced to Parliament on 13 February

s588FDA –
'creditor-
defeating
disposition'

consideration payable to the company was less than the lesser of the following at the time agreement for the disposition was made or, if there was no such agreement, at the time of the disposition:

the market value of the property; and

the best price that was reasonably obtainable for the property, having regard to the circumstances existing at that time

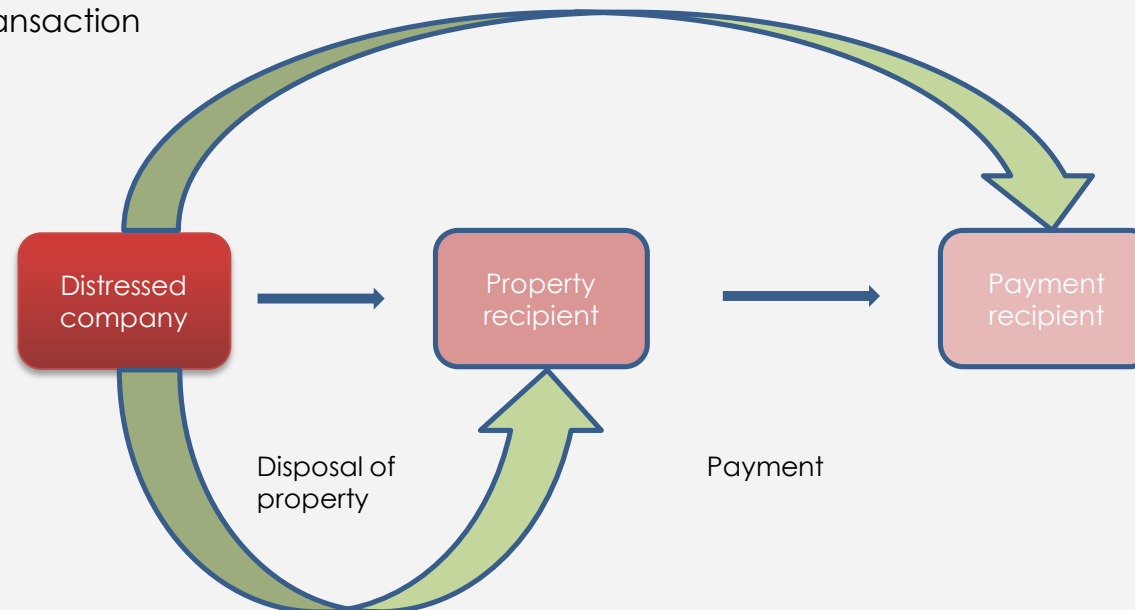
the disposition has the effect of:

preventing the property from becoming available for the benefit of the company's creditors in the winding-up; or

hindering, or significantly delaying, the process of making the property available for the benefit of the company's creditors in the winding-up

Combating phoenix activity

- Broadened meaning of 'disposition'
- New s588FDB(2) – company will be taken to have made a disposition of property if it does something that results in another person becoming the owner of property that did not previously exist(eg the grant of a right or interest)
- New s588FDB(3) also seeks to extend the concept of a disposition to reflect economic substance of a transaction



Combating phoenix activity

transaction **will be voidable** if it is a *creditor-defeating disposition* and:

the transaction was entered into (or an act was done to give effect to it) within 12 months ending on the relation-back day:

at a time when the company was insolvent; or

where the company became insolvent because of the disposition; or

the company enters external administration less than 12 months after the disposition and that administration is a direct or indirect result of the transaction

transaction or disposition **will not be a voidable** creditor defeating disposition if it was entered into or done:

under a compromise or arrangement approved by a Court under section 411; or

under a DOCA executed by the company; or

by an administrator, liquidator or provisional liquidator of the company; or

if a designated defence can be made out

Combating phoenix activity

- express duty on officers not to engage in conduct that results in a company making a creditor defeating disposition (**s588GAB**)
- prohibition on any person engaging in conduct procuring, inciting, inducing or encouraging the making of a such a disposition (**s588GAC**)
- ASIC possessed of powers similar to that of the Court to deal with/set aside such transactions
- preventing directors from improperly backdating resignations or ceasing to be a director when this would leave the company with no directors
- Commissioner of Taxation to collect estimates of anticipated GST liabilities and make company directors personally liable for their company's GST liabilities in certain circumstances
- Commissioner to retain tax refunds where a taxpayer has failed to lodge a return or provide other information that may affect the amount the Commissioner refunds

Related creditor voting

- *Insolvency Practice Rules (Corporations) Amendment (Restricting Related Creditor Voting Rights) Rules 2018*
- Became operative on 7 December 2018

75-95 Evidence of liability for debt

(1) If necessary, an external administrator must ask a creditor to give evidence in writing in relation to a debt claimed by the creditor to establish the liability of the company for the debt.

(1A) If:

(a) a resolution is proposed at a meeting of creditors of a company; and

(b) a debt claimed by a creditor of the company is owed to the creditor as assignee;

the external administrator of the company must ask the creditor to give evidence in writing in relation to the debt and the consideration given for the assignment of the debt.

(2) If the external administrator considers that the evidence is insufficient for the purposes of subsection (1), the administrator, before asking for further information, must have regard to the expected dividend rate and the materiality of the issue requiring clarification.

(3) An external administrator must keep a copy of any evidence or information relied on in deciding, for the purposes of voting or distributing dividends, whether to accept or reject a creditor's claim.

Related creditor voting

- A new subpara (7) has been added to rule 75-110:

For the purposes of determining whether a resolution is passed at a meeting of creditors of a company, the value of a creditor of the company who:

- a) is a related creditor (within the meaning of subsection 75-41(4) of the Insolvency Practice Schedule Corporations)), for the purposes of the vote, in relation to the company; and
- b) has been assigned a debt; and
- c) is present at the meeting personally, by telephone, by proxy or attorney; and
- d) is voting on the resolution;

is to be worked out by taking the value of the assigned debt to be equal to the value of the consideration that the related creditor gave for the assignment of the debt.

Notable cases – 2018/19

RWE Robinson

- Circulating assets and priority claims – is a receiver responsible?

Mossgreen

- Demonstration of some of the limits to an administrator's equitable lien

Traditional Therapy Clinics

- ASIC intervention in appointment of administrators

Bazzo v Kirman – GH1 Pty Ltd

- When will an examination be held in private?

Pluton – Jacobs v Hughes

- Receivers' potential liability where non-compliance with s433

Mighty River

- High Court confirms the validity of 'holding' DOCAs

Re RWE Robinson & Sons Pty Ltd

- *Amerind*-type case – circulating assets of a trust
- Receivers appointed shortly after liquidators – s561 applied
- Receivers sold circulating assets and held the proceeds
- Liquidators demanded proceeds be handed over
- Receivers sought a direction as to whether s561 imposes a duty on a receiver holding circulating proceeds
- Result: the obligation to pay priority claims from circulating proceeds under s561 falls on the person holding the proceeds

Limitations of administrator's lien

White (admrs of Mossgreen) v Robertson [2018] FCAFC 63

- Auction house held goods on consignment.
- At appointment of VA, some uncertainty as to the owners of particular lots.
- VA undertook a stocktake (costing \$1m), identified owners of all goods held on consignment.
- VA wrote to owners of the consigned goods, asserting a lien for the costs of the stocktake and demanding payment of \$353.20 per lot before any goods would be returned. This was more than the value of many of the lots.

Limitations of administrator's lien

- VA applied for a direction retrospectively approving that course of action.
- Court held:
 - Unclear that an equitable lien arose.
 - To the extent a stocktake was necessary, it was due to a breach of Mossgreen's obligations as bailee, and the victims of that breach should not be required to cover the cost of rectifying it.
 - No evidence the VA considered other options to identify owners.
 - Benefit of stocktake was primarily for unsecureds who received the proceeds of the sale of the business.
 - Approved trial judge's refusal to give a direction.

Limitations of administrator's lien

Key lessons:

- 1. Seek a direction at the outset
- 2. Consider whether the approach to be taken is the most efficient and equitable approach
- 3. Consider whether there are alternatives: cost effective, efficient
- 4. Don't assume you'll have the benefit of an equitable lien – who is really benefiting? Why should the owners/secured parties bear the cost?
- 5. Key issues are proportionality, reasonableness and fairness
- 6. Get advice - speak to your lawyer!

Traditional Therapy Clinics Ltd

- ASX listed company with business based in China
- Three Chinese directors decided to appoint administrators
- Administrators provided appointment documents, and suggested the company needed to appoint two Australian directors before proceeding
- After appointment, ASIC investigated and discovered the Australian directors did not hold a genuine opinion that the company was insolvent or likely to become insolvent
- ASIC's view: the administrators were not validly appointed
- Administrators (by now liquidators) applied to Court for declaration of validity

Traditional Therapy Clinics Ltd

- Court held: an appointment is valid if the *majority* of voting directors held the opinion that the company was insolvent or likely to become insolvent
- ASIC's argument would lead to perverse outcomes
- Administrators need to be attuned to any matter that could give rise to a suggestion that directors did in fact not hold the necessary opinion.

Bazzo v Kirman as liquidator of GH1 Pty Ltd – examinations in private

- Bazzo and Caratti are the directors of a group of companies in liquidation, including GH1 Pty Ltd, and are the subject of a long-running investigation by the ATO and AFP.
- Directors were summoned for examination by the liquidators
- Applied for the examination to be held in private, to avoid information being used in the criminal investigation
- Private examination requires ‘special circumstances’
- The usual course needs to be an examination in public
- The protection of privilege against self-incrimination is in s597(12A), and only in exceptional circumstances should the Court impose additional safeguards


Jacobs v Hughes – Pluton Resources Ltd


- Bryan Hughes was the receiver of Pluton
- Retired in 2018 – Bob Jacobs appointed new receiver
- Former receiver held funds from the receivership in anticipation of claims by third parties and FEG
- New receiver commenced proceeding for an order that the funds be paid over by the former receiver
- FEG intervened to make submissions on the potential for liability for alleged breaches of s433


Jacobs v Hughes – Pluton Resources Ltd


- Section 433 imposes a positive duty on the receiver
- Identifying circulating assets upon appointment is essential
- Make sure there is a source of funds to cover any liability – the appointor's indemnity, non-circulating assets, or a third-party funder prepared to provide funds in advance.

Holding DOCA upheld

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On 12 September 2018, the High Court in *Mighty River International Limited v Hughes* confirmed that a 'holding' deed of company arrangement can represent a valid use of the DOCA process
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A 'holding DOCA' is one that it does not make provision for the distribution of any property to creditors and provides for an ongoing moratorium against the company while administrators investigate claims or seek restructuring proposals
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The positive : such instruments can continue to be used in practice
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The negative: the High Court simply endorsed the DOCA that it was asked to consider. Given that the term 'holding DOCA' is not defined by the Corporations Act, we must remember that a DOCA will always stand to be assessed by reference to its actual terms, and not by what it is called



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LAWYERS

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Next CIDG Session

Wednesday, 3 July 2019



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