

CITY INSOLVENCY DISCUSSION GROUP

Wednesday, 5 February 2020

TOPICS:

Recent Case Studies:

- *Voidable Transactions*
- *Perrinepod Pty Ltd (in Liq) v Perrine Architecture Pty Ltd [2016] WASC 145*
- *Special Purpose Liquidators*

PRESENTED BY

*Aaron McDonald - Director
Pragma Lawyers*



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*Recent Case Studies for Liquidators:
Voidable Transactions, Insolvent
Trading and Special Purpose
Liquidators*

*Presented by Aaron McDonald
Director, Pragma Lawyers*



Case Study 1
Voidable Transactions

Case Study 1

Voidable Transactions

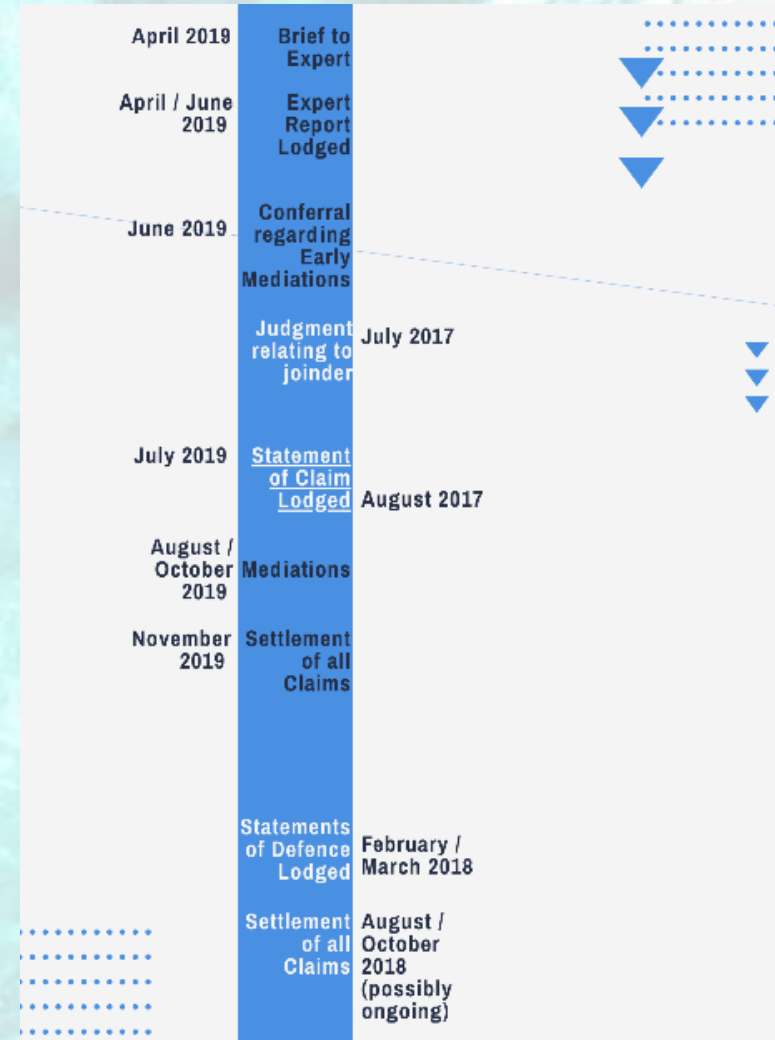
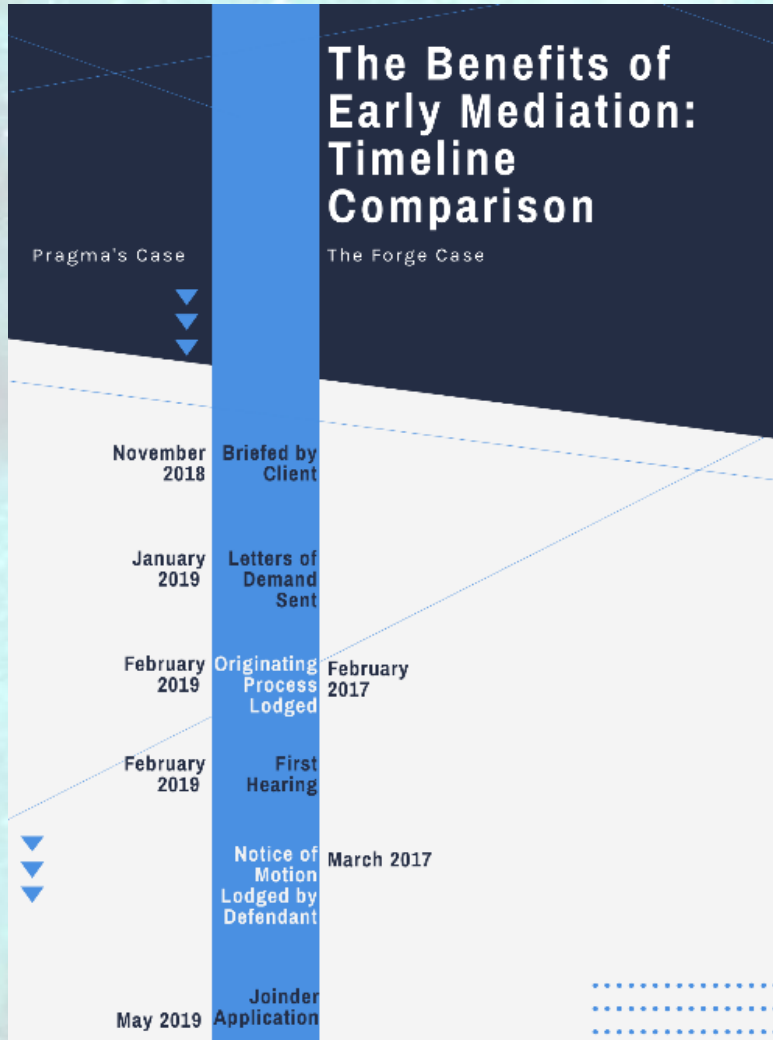
- **Client's Interests:** Time and money (usually)
- **Jurisdiction:** Supreme v Federal? (*Dudley (Liquidator) v RHG Construction Fitout & Maintenance Pty Ltd* [2019] FCA 1355).
My view: Supreme.
- **Joinder:** *Martin Bruce Jones (As Liquidator of Forge Group Ltd (Receivers and Managers Appointed) (In Liquidation) v Sun Engineering (QLD) Pty Ltd*
 - Application for Leave *nunc pro tunc* can cure irregularity
- **Mediation:** Before or after the close of pleadings? Before or after response of expert evidence is filed?

My view: before in both cases.



Case Study 1

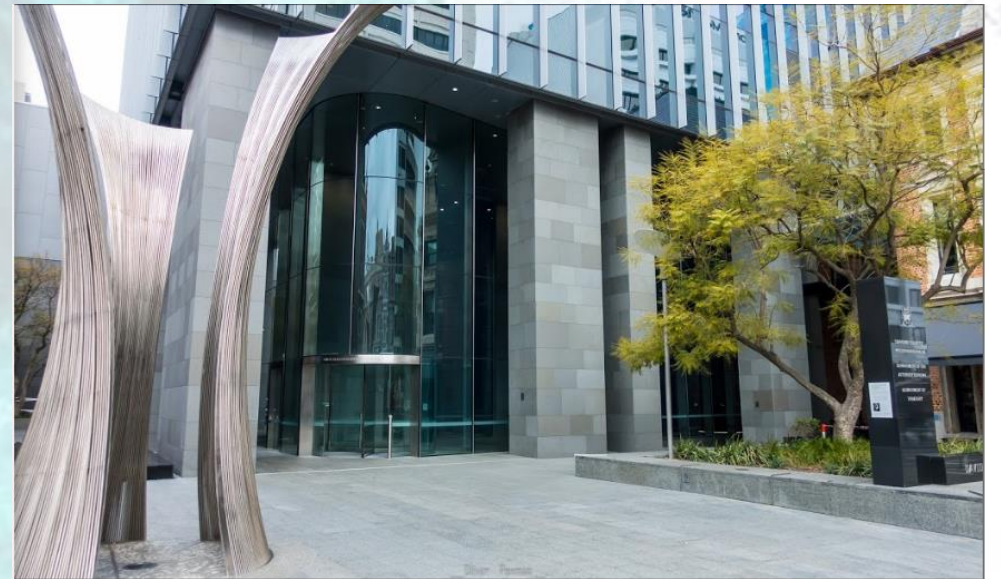
Voidable Transactions



Case Study 1

Voidable Transactions

- Key takeaways
 - Consider if early mediation is in your interests (it usually is)
 - Commence any legal proceedings well in advance of any limitation dates (Forge proceeding commenced with one day space).





Case Study 2

*Perrinepod Pty Ltd (in Liq) v Perrine
Architecture Pty Ltd [2016] WASC 145*

Case Study 2

Perrinepod Pty Ltd (in Liq) v Perrine Architecture Pty Ltd [2016] WASC 145

Facts:

- Claims by a Liquidator for insolvent trading against a company's directors and its parent company under Sections 588G and 588V of the Corporations Act.
- Mr and Mrs Perrine were directors and shareholders of Perrinepod and its holding company (Perrine Architecture).
- Perrine Architecture charged Perrinepod for office equipment facilities and staff on a running account basis from the early stages of Perrinepod's existence (payments made by Perrinepod as and when able).
- Perrine Architecture was the majority creditor in liquidation.
- The Liquidator's claim (for \$5.7M plus interest) was brought against the directors and Perrine Architecture for insolvent trading and voidable transactions.

Case Study 2

Perrinepod Pty Ltd (in Liq) v Perrine Architecture Pty Ltd [2016] WASC 145

Held:

- The company was insolvent from 16 July 2010 (adverse adjudication determination awarded against it).
- Financial statements did not support earlier insolvency date.
- Directors knew there were grounds to suspect insolvency when adverse determination made. Accordingly, they were liable for losses suffered by creditors during the period of insolvency.
- Perrine Architecture (holding company) held liable under s.588V. No defence available under s588X.

Case Study 2

Perrinepod Pty Ltd (in Liq) v Perrine Architecture Pty Ltd [2016] WASC 145

Key takeaways:

- When dealing with insolvent companies indebted to related entities, Liquidators should be fortified in proceeding on the basis that related entities will rank behind other creditors when the claims lie against the common directors (s 588Y *Corporations Act*).
- Importance of financial statements to support insolvency date. Result of insufficient evidence meant a large number of creditors' debts were unrecoverable.



Case Study 3
Special Purpose Liquidators

Case Study 3

Special Purpose Liquidators

- Court has power to appoint a special purpose liquidator (SPL) under section 90-15 of Division 90 of Schedule 2 of the *Corporations Act*.
- Section 90-15 of Schedule 2 confers power on the Court to “*make such orders as it thinks fit in relation to the external administration of a company*”.
- Section 90-15 was enacted by the *Insolvency Law Reform Act 2016 (Cth)* (IRLA 2016), which repealed a similarly broad power conferred by former section 511 of the *Corporations Act*.

Case Study 3

Special Purpose Liquidators - *Section 90 -15 (Text)*

Orders on own initiative or on application

- (2) The Court may exercise the power under subsection (1):
- (a) on its own initiative, during proceedings before the Court; or
 - (b) on application under section 90-20.

Examples of orders that may be made

- (3) Without limiting subsection (1), those orders may include any one or more of the following:
- (a) an order determining any question arising in the external administration of the company;
 - (b) an order that a person cease to be the external administrator of the company;
 - (c) an order that another registered liquidator be appointed as the external administrator of the company;
 - (d) an order in relation to the costs of an action (including court action) taken by the external administrator of the company or another person in relation to the external administration of the company;
 - (e) an order in relation to any loss that the company has sustained because of a breach of duty by the external administrator;
 - (f) an order in relation to remuneration, including an order requiring a person to repay to a company, or the creditors of a company, remuneration paid to the person as external administrator of the company.

Matters that may be taken into account

- (4) Without limiting the matters which the Court may take into account when making orders, the Court may take into account:
- (a) whether the liquidator has faithfully performed, or is faithfully performing, the liquidator's duties; and
 - (b) whether an action or failure to act by the liquidator is in compliance with this Act and the Insolvency Practice Rules; and
 - (c) whether an action or failure to act by the liquidator is in compliance with an order of the Court; and
 - (d) whether the company or any other person has suffered, or is likely to suffer, loss or damage because of an action or failure to act by the liquidator; and
 - (e) the seriousness of the consequences of any action or failure to act by the liquidator, including the effect of that action or failure to act on public confidence in registered liquidators as a group.

Case Study 3

Special Purpose Liquidators (*con't*)

THE COURT ORDERS THAT:

1. Pursuant to section 472(1) of the *Corporations Act 2001* (Cth) (Act), Laurence Fitzgerald be appointed as additional liquidator (Special Purpose Liquidator) to the First Defendant (**Company**) for the purposes of investigating and prosecuting, and extending the time for prosecution of, claims by, or on behalf of, or for the benefit of the Company (including without limitation, conducting public examinations under sections 596A and 596B of the Act), except for prosecuting any proceeding filed by the Second Defendants on or prior to 7 September 2018.
2. Liberty to apply is reserved, including that of the Special Purpose Liquidator and the Second Defendants in relation to any further matter which arises in the winding up of the Company.

DATE AUTHENTICATED:




THE HONOURABLE JUSTICE SIFRIS



Case Study 3

Special Purpose Liquidators (*con't*)

- Creditors of a company under external administration have standing to apply for an order under section 90-15 to appoint an SPL.
- Example of recent case in which Special Purpose Liquidator appointed: *Williams & Kersten Pty Ltd v Walton Constructions (Qld) Pty Ltd (in liq)* [2019] FCA 1201.
- In *Williams*, application to appoint an SPL was brought by an unsecured creditor.
- Purpose was for SPL to investigate and, if appropriate, bring proceedings against director for alleged breach of directors duties.

CITY INSOLVENCY DISCUSSION GROUP

Next CIDG Session

Wednesday, 4 March 2020



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INSOLVENCY WA



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