

INSOLVENCY LAW JOURNAL

Volume 12, Number 3

September 2004

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ARTICLES

Geneva Finance and the “duty” of directors to creditors: Imperfect obligation and critique – Anil Hargovan

Recent commentary has criticised Heenan J’s legal analysis in *Geneva Finance Ltd v Resource & Industry Ltd* (2002) 169 FLR 152; 20 ACLC 1427 on the nature of directors’ duties to creditors. The criticism arose from the failure of Heenan J to consider particular commentary on the impact of High Court statements in *Spies v The Queen* (2000) 201 CLR 603. With reference to the clear message from the majority justices in *Spies v The Queen*, this article explains why criticism directed to Heenan J’s analysis of directors’ duties to creditors is unconvincing. From a legal analysis perspective the article agrees with Heenan J’s deference to, and adoption of, *Spies v The Queen* in rejecting independent fiduciary duties to creditors. The article also critically examines whether the claim that cases that offer a radical interpretation of dicta in *Walker v Wimborne* (1976) 137 CLR 1, and suggest direct duties to creditors, are still capable of generating some noise in the face of judicial statements in two High Court cases. 134

The voluntary administrator’s equitable lien: Nature, scope and priority – David J Walter

The *Corporations Act 2001* (Cth) provides a voluntary administrator appointed pursuant to Pt 5.3A with a statutory lien over the assets of the company for purposes of satisfying any liabilities incurred by him or her during the course of the administration of the company. That lien, however, is subject to other priorities in the liquidation, including, inter alia, fixed-charge holders and employees of the company. It is argued that the voluntary administrator also has an equitable lien over the assets in his or her possession at the time the liquidation commences. Further, it is argued that this lien takes priority over all other claims to the property of the company made by competing creditors. In the light of recent decisions of a number of superior courts throughout Australia, the nature, scope and extent of this equitable lien is analysed. Further, instances in which an administrator may lose a lien, or have it relegated in a priority dispute are discussed. 150

Themes and movements in international insolvency law – Paul J Omar

The phenomenon of international insolvency has had an impact on the consciousness of legislators, regulators, members of the business community, practitioners, academics and other commentators in a way that has demonstrated its emergence as a product of that other phenomenon known as globalisation. The rise in the number of reported instances of insolvencies of international financial institutions and corporate bodies has resulted in

attention being focused on the resolution of the problems raised by this phenomenon. This process is beset with difficulties, not least because of insolvency's strong relationship with economic, political and social factors. Furthermore, in legal terms, international insolvency requires the ability to deal with issues of private international law as they have an impact on insolvency matters. The production of legal frameworks to deal with the organisation of insolvency proceedings across national frontiers has now moved from the domestic field to the international arena. This has also had an impact on the availability of cross-border reorganisations and the possibility of rescue of viable businesses composed of units located in different territories. The promotion of corporate rescue has thus gone hand in hand with that of international insolvency texts. It is the purpose of this article to chart some of the themes and movements that have characterised international insolvency in recent years. 159

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ISSN 1039-3293

Typeset by Lawbook Co., Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW