INSOLVENCY LAW JOURNAL

Volume 14, Number 2

June 2006

EDITORIAL 65

ARTICLES

Derivative exposures and insolvency – recent cases and examples – *Andrew Barclay*

Numerous recent high profile corporate collapses have been attributed to financial exposures under derivatives, which were often initially put in place to protect a company from movements in commodity prices or exchange rates. However, as those movements occur, the contingent exposure under the derivatives reach a level which causes much nervousness on the part of the company, its officers and its financiers. This article analyses the payment obligations imposed on a counterparty by the standard documentation used for derivative transactions in Australia. The analysis includes a commentary on the recent judicial pronouncements on that standard documentation, which have occurred as a consequence of the collapse of Enron Group of Companies. Secondly, the article looks at recent judicial comment on the meaning of "insolvency" in s 95A of the *Corporations Act 2001* (Cth). Finally the article seeks to assess in what circumstances exposures under derivatives might reasonably lead a company to conclude that it is insolvent. 67

How can a lessor stop a lessee's administrator running its property into the ground? – *Andrew Gormly*

Limited judicial interpretation and recent commercial practice have exposed a flaw in s 443B(2) of the *Corporations Act 2001* (Cth). With administrators personally liable only for rent owing on leased equipment during an administration, they have little incentive to maintain it properly. And with leasing structures now being used for increasingly expensive (and fragile) items like machinery and aircraft, many lessors face irreparable damage to their goods. Some lessors can protect themselves by making a deal with an administrator, under which they'll give the company more equipment (or funds) only if the administrator becomes personally liable for maintenance on all of the leased property. However, this isn't available to all lessors – and worse, it gives those privileged lessors a super-priority ahead of other creditors (including employees). This article illustrates the current regime's shortcomings and shows how recent attempts to circumvent them only create more problems. It concludes that a simple solution is the most appropriate. 81

"Ultimate effect" or maximum recovery? – should liquidators be able to apply the "peak indebtedness rule" to running accounts when pursuing unfair preference claims? – *Damien McAloon*

The "peak indebtedness rule" is routinely used by liquidators to maximise their recovery in unfair preference claims where the creditor defending the claim is able to rely upon the existence of a running account. In a submission to the Parliamentary Joint Committee on Corporations and Financial Services, the Australian Credit Forum described the rule as "manifestly unfair" and sought its abolition. This article considers the origins of the peak indebtedness rule and whether its application is consistent with the underlying principles of insolvency law. 90

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Privacy and the sale of customer lists in South African and Australian corporate insolvency law – *Alastair Smith*, *Christopher Symes* and *Fiona Mullins*

A customer list is fundamental to most companies, so it is essential that they develop and articulate privacy policies. Given the potential existence and value of a company's customer list to an insolvent company's estate, this article analyses the applicability of Australian privacy laws and South African laws based in contract, delict or the *Constitution*. The authors argue that liquidators wishing to sell customer lists must give careful consideration to the protection of privacy. 98

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