

# INSOLVENCY LAW JOURNAL

Volume 21, Number 4

December 2013

EDITORIAL ..... 223

## ARTICLES

### **Defining deprivation: The anti-deprivation and pari passu principles post Belmont** – *Angus Macauley*

The United Kingdom Supreme Court decision in *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383 is a watershed decision, signalling a firm distinction between two related principles which apply in insolvency: the pari passu principle and the anti-deprivation principle. However, it remains unclear whether these principles are also discrete in operation. That is to say, it is unresolved whether both principles can be infringed at the same time. This article argues that there exists an incongruity between the way “deprivation” has been defined for the purposes of the anti-deprivation principle, and the manner in which the principle has been applied. Once this is addressed, it is apparent that the anti-deprivation principle and pari passu principles are not mutually exclusive in operation, as previously thought, and in fact a contravention of the former will often entail a consequential violation of the latter principle. Notwithstanding this clarification, there still remain other difficulties in understanding the application of the anti-deprivation principle. However, these may well be largely academic given the limited area in the insolvency landscape in which both of these principles reside. .... 225

### **Calling for reform to the statutory derivative action in Australia: Critical analysis and suggestions for reform** – *Lang Thai*

A statutory derivative action is a court action brought on behalf of and in the name of the company. The provisions have been available under Pt 2F.1A of the *Corporations Act 2001* (Cth) since March 2000, and in Australia, leave of the court is required to commence a derivative action. However, the provisions have not been widely used and judicial findings have been inconsistent for various reasons. This article provides a critical analysis of the statutory derivative action and points out the four main areas of defect in the provisions. In calling for reform, the article also provides some suggestions and recommendations on how best to proceed with such reform, particularly in relation to the leave requirement, the costs issue and the issue relating to whether and to what extent the statutory derivative action under Pt 2F.1A can be used in a company in liquidation. The objective is to simplify the process for applying for leave to bring a derivative action and to improve its use as a remedial tool. .... 242

### **Reconsidering the agency of a privately appointed receiver and manager in three specific circumstances** – *Bill Dixon and W D Duncan*

Where a secured lender elects to appoint a receiver and manager, the appointment document standardly provides for the receiver and manager to act as the agent of the debtor. This article considers the significance of this agency in the context of three specific issues that have the potential to arise in the receivership of a corporate borrower across all Australian jurisdictions. .... 263

RECENT DEVELOPMENTS – *David Morrison*

**Australia’s adoption of UNCITRAL’s insolvency recommendations with respect to enterprise groups: A critique** – *Jenny Dickfos* and *David Morrison* ..... 273

REPORT FROM NEW ZEALAND – *Lynne Taylor*

**Assignments of a liquidator’s right to sue** – *Lynne Taylor* ..... 282

**Update on Court of Appeal decision in *Farrell v Fences & Kerbs Ltd*** – *Trish Keeper* .... 286

---

**VOLUME 21 – 2013**

**Table of authors** ..... 291

**Table of cases** ..... 293

**Index** ..... 307