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Update Summary

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COMPANY RECEIVERS AND ADMINISTRATORS

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CRA Summary for Update 2 of 2024

Author Dr James O'Donovan has extensively reviewed and updated case, legislation and related reading material in this update.

The legal framework of company receiverships

It is noted that, a solicitor who signs a contract of sale as attorney for a mortgagee pursuant to a power of attorney conferred by the mortgagee does not become a "controller" of the property within the meaning of s 9 of the *Corporations Act 2001.* See [1.50].

The right to appoint receivers and managers

where a debt is assigned without a security for the debt, the assignee may not appoint a receiver and manager pursuant to the charge. See [2.10].

Scope of appointment and Express exclusion and implied inclusion

See *Re Avanti Communications Ltd (In Admin)* [2023] EWHC 940 (Ch); 2 BCLC 355 and Emery K and Larkins J "Excluding assets from a floating charge?: what else might you be excluding?" for excluding certain assets from a security interest in circulating assets. See [5.210].

Uncommercial transactions and the insolvent transaction requirement

A company that is funded predominantly by its parent company can be insolvent where the parent company's funds are not genuinely and realistically available as a matter of commercial reality because the parent company is not bound to continue to fund its subsidiary or to defer payment. See [7.5030].

Reforms relating to voidable transactions and unfair preferences

In July 2023, the Parliamentary Joint Committee on Corporations and Financial Services recommended a comprehensive review to consider, inter alia, unfair preferences and voidable transactions as a core aspect of potential insolvency reform. See [7.6120].

Equitable liens

For the purposes of an equitable lien, there is no requirement that the receivers "activity adds value to the company's interest in the property": *Re Arcabi Pty Ltd (in liq); Ex Parte Theobald* [2014] WASC 310. See [9.1610].

Public examination orders under Corps Act 2001, s 596A and s 596B

The applicant for an examination summons must show that there is a reasonable hypothesis that the proposed examinees may be able to give information about the examinable affairs of the company. See [10.1070] and [44.500].

Further, where there is a genuinely asserted right about examinable affairs, it cannot be an abuse of process to apply for examination summonses whilst simultaneously

pursuing settlement negotiations to the extent that they may be in the best interests of creditors. See [10.1110] and [44.510].

The court can make a confidentiality order under s 37AF of the *Federal Court of Australia Act 1976* (Cth) to preserve the commercial sensitivity of matters disclosed in an affidavit filed in support of an application to the court for a public examination order. See [10.1130].

Receivers and managers appointed out of court

Duty to safeguard charged assets

Where receivers cannot segregate the secured goods in storage from other goods, they may claim a proportionate part of the costs of insuring all the goods. See [11.870].

Sales below market value

Post valuation sales are of doubtful or at least limited utility in establishing a breach by a mortgagee of a duty of good faith or the statutory duty to take reasonable care. See [11.3316].

However, a sale can satisfy the receivers' duty under s 420A even if it is at the lower end of the range recommended in a valuation. See [11.3318].

Fixing and varying the receivers' remuneration

It is noted that, Corps Act 2 425 only applies to privately appointed receivers. The term "instrument" in s 425 does not include a court order. Hence, s 425 does not give the court power to fix the remuneration of a court-appointed receiver. See [12.610].

Where security becomes enforceable

Even when the security agreement grants to the creditor the right to appoint a private receiver, the creditor must still establish that a court appointment of a receiver is just and convenient. See [19.210].

Chapter 31 - Corporate restructuring

Of significance is the addition of a new chapter addressing corporate restructuring.

Initially the author sets out reasons for restructuring which include:

(i) economic challenges;
(ii) changes in the industry;
(iii) mergers and acquisitions;
(iv) improving efficiency;
(v) cost cutting;
(vi) diversification; and
(vii) legal and regulatory compliance: reorganisation of management.

See [31.10].

The concept of restructuring is "much easier to describe than to define". See [31.20].

The author then discusses the following types of restructuring in turn:

- Small business restructuring under Corps Act 2001 Pt 5.3B – see [31.100];
- Voluntary administration and deeds of company arrangement under Corps Act 2001, Pt 5.3A – see [31.60];
- Schemes of arrangement under Corps Act 2001, Pt 5.2 – see [31.80] and
- Cross- border restructuring – see [31.100].

Effect of restructuring on the trustee of a superannuation entity

The appointment of a restructuring practitioner is an insolvency event that triggers the disqualification of a corporate trustee, custodian or investment manager of a superannuation entity. See [34.880].

Effect of restructuring on takeovers

Further, s 652C allows a takeover bidder to withdraw an unaccepted takeover offer if the target company becomes insolvent, including where it appoints a restructuring practitioner or makes a restructuring plan. See [34.920].

Protection for parties dealing with restructuring practitioners

Sections 128 and 129 of the *Corporations Act 2001* (Cth) apply in relation to a company that is under restructuring. Where any person deals with a restructuring practitioner who is an agent of the company, they should be entitled to the same protections that arise if they were dealing with the company itself. See [34.1160].

Protection for third parties

Similarly, when performing a function or duty or exercising a power as restructuring practitioner for the plan, the restructuring practitioner is taken to act as agent for, and on behalf of the company. The effect that ss 128 and 129 have because of s 456LB(2) is additional to, and does not prejudice, the effect of s 128 and s 129 otherwise in relation to a company that has made a restructuring plan. See [36.900].

A number of academics and ASIC have recommended reforms be implemented in relation to the small business restructuring procedure, subsequent to challenges being identified with the procedure. See [39.500].

Administrator's power of management

The court can give external administrators directions to take possession of property of the company that is subject to registered interests where the administrators are best placed to conduct an orderly realisation of assets. See [44.190].

Further, Administrators can apply for an ex parte interim world-wide freezing order in respect of the assets of a director of another company that was allegedly involved in a dishonest and fraudulent design in relation to the company's funds. See [44.200].

Extension of the convening period

One of the factors that the court considers in deciding whether to grant an extension of the convening period is whether the public interest is served in averting insolvency. Further, an extension of the convening period may be granted with alacrity where the

administrators are hampered by insufficient access to the company's books and records. See [45.30].

Binding effects of the deed of company arrangement

A person bound by the deed cannot initiate or continue with a proceeding in relation to any of the company's property (including choses in action) without the leave of the court under s 444E(3)(a), which may be granted nunc pro tunc (ie retrospectively). See [51.10].

The powers of the administrator of a deed of company arrangement

A deed of company arrangement combined with a transfer of shares under s 444GA is a well-established vehicle for recapitalising an insolvent company. The central consideration is whether a compulsory transfer of shares would result in unfair prejudice to the members of the company as a whole in their capacity as members. See [54.560].

Adjudicating on proofs of debt

the costs of an arbitration are not admissible to proof under a DOCA unless the arbitral tribunal has exercised its discretion as to costs before the relevant date, which is usually the date of the administrator's appointment. See [55.400].

Oppression and unfair prejudice or discrimination

The court can terminate a deed of company arrangement where the voluntary administration process was used to avoid an unwanted debt and scrutiny of whether the company had engaged in insolvent trading, especially where the deed was unfairly prejudicial to, and unfairly discriminatory against, a major creditor. See [56.260].