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Update Summary

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UPDATE 112

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McPHERSON'S LAW OF COMPANY LIQUIDATION

MGR Gronow KC

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Commentary

Michael Gronow KC has updated commentary on Chapter 11 (Assets available for division and distribution). Highlights include the following:

Assets held by company on trust

Whether a company trades in its own right or as trustee of a trust depends on factors which are specific to the circumstances. Relevant factors include the existence of constituent trust documents (including drafts) which establish a trust, and whether accounts are maintained separately, whether the company's name in its capacity as trustee is noted on key employment documents and invoices and whether company minutes disclosed the existence of a trust or that the company operated as a trust. Other relevant factors can include whether the company has its own Australian Business Number or only one registered to the trust, whether the company's bank account(s) are in its name as trustee of a trust, whether its accounting records are expressed to be for the company as trustee and whether its Business Activity Statements record its activity as trustee: *Re Mohan and Mariam Pty Ltd (in liq)* [2023] VSC 723. See [11.130].

"Unreasonable director-related transactions" under s 588FDA – Concept and definition

An unreasonable director-related transaction may be constituted by a company's execution of a mortgage whereby land belonging to the company was given as additional security for a loan (even though the company was not named as a borrower) and the mortgage gave a benefit to directors: *Cooper v CEG Direct Securities Pty Ltd* [2024] FCA 6. See [11.1400].

Limitation period for initiating avoidance proceedings

The limitation period is usually three years from the relation-back day. However, extensions are possible. Relevant factors for consideration by the court include the adequacy of the liquidator's explanation for the delay in commencing proceedings, a preliminary enquiry into the merits of the proposed proceedings and any likely actual prejudice flowing from the grant of extension sought (*Re Provest 684 Pty Ltd (in liq)* [2024] FCA 128) or the complexity of the company's affairs and records (or lack thereof), the financial resources available to a liquidator, as well as the complexity of the investigations required, and what is fair and just in all the circumstances: *Re i-Prosperity Pty Ltd (in liq)* [2023] FCA 1446. See [11.2230].