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Update Summary

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McPHERSON'S LAW OF COMPANY LIQUIDATION

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Commentary

Michael Gronow KC has updated commentary on Chapters 4 (Contributories' winding-up applications), 5 (Miscellaneous winding-up applications) and 6 (Provisional liquidation). Highlights include the following:

Impossibility of carrying on the company's business

The Court may wind a company up on the just and equitable ground where the company can no longer operate as a matter of practicality, even if this is due to internal rather than external causes. It may be appropriate to put a company into liquidation under s 461(1)(k) where it had only one director who (in breach of s 201A) is not resident in Australia and is unlikely to return to Australia while he is subject to an arrest warrant based on fraud allegations: *Re JKN Hills Pty Ltd (Controllers Appointed)* [2024] NSWSC 577. See [4.255].

Impossibility of carrying on business due to "deadlock" – general principles

The principles for assessing the effect of a deadlock on carrying on business were summarised in *VCS Holdings Pty Ltd (in liq) v KVG Contracting Services Pty Ltd* [2023] WASC 189 and approved on appeal in *Koodaideri Pty Ltd v VCS Holdings Pty Ltd (in liq)* [2024] WASCA 62. However, a person who is themselves responsible for the breakdown of the relationship is less likely to be afforded relief: *Re Meglo Yowrie Flat Units Pty Ltd* [2023] NSWSC 1634. See [4.275].

Practice and procedure – winding up applications

The power to grant summary judgment on a contributory's application to wind up a company should be exercised with caution. It should not be done where there are "triable issues": *Re Property Project Marketing Pty Ltd* [2024] VSC 45. See [4.1000].

Liquidator's application very unusual now

The making of a winding-up application by the liquidator of a company is nowadays very unusual. For the purposes of s 462(2), it has been held that a "liquidator" includes a provisional liquidator. Usually, the applicant in the proceeding in which the provisional liquidator was appointed would continue to seek a winding up order, but provisional liquidators might seek one where for example, they have concerns about some transactions involving the company's assets and wish to carry out further investigations which may reveal breaches of directors' duties and voidable transactions which may be recoverable: *Hassan v Image Nominees Pty Ltd (in liq)* [2023] FCA 1645. See [5.50].

The just and equitable ground

ASIC has standing to apply for a winding-up order under s 461, including the "just and equitable" ground under s 461(1)(k). There seems no reason at all why a court entertaining such an application should not have regard to public interest considerations: *ASIC v Brite Advisors Pty Ltd* [2024] FCA 69. See [5.280].

Grounds for appointment – general principles

The requirements for a court to be satisfied about the need to appoint a provisional liquidator exist because it is a drastic intrusion into the affairs of the company, and it is necessary to consider whether less intrusive measures are available: *Re Glad Indigenous Pty Ltd* [2023] NSWSC 1499; *Hema Maps Pty Ltd v HemaX Digital Pty Ltd* [2024] FCA 1127. See [6.300].

Other circumstances courts will consider

It may be appropriate to appoint a provisional liquidator when the other affected party or parties have withdrawn their opposition to the appointment, and it is otherwise an appropriate case: *Hema Maps Pty Ltd v HemaX Digital Pty Ltd* [2024] FCA 1127. See [6.330].

Situation when receiver appointed

An application for the appointment of a provisional liquidator may be refused where receivers were appointed by the Court before the filing of the winding up application, and by virtue of that appointment as well as the appointment of administrators, there is no risk of dissipation assets, apart from duplication of work: *ASIC v Keystone Asset Management Ltd (recs and mgrs apptd) (admins apptd) (No 2)* [2024] FCA 1040. See [6.350].

Powers and duties in appointing order

To preserve the status quo until the winding up application is determined, the court can limit the provisional liquidator's powers by excluding specified powers in s 477(2), such as the power to sell or otherwise dispose of company assets, and to obtain credit, whether on security of the property of the company or otherwise: *Hema Maps Pty Ltd v HemaX Digital Pty Ltd* [2024] FCA 1127. See [6.500].

When provisional liquidation ends

Where the provisional liquidation ends because the company is put into full liquidation, it is common to appoint the provisional liquidator as liquidator for reasons of cost and efficiency (including avoiding the cost of a new liquidator familiarising themselves with the company's affairs), unless there is a good reason not to, such as a conflict of interest, or a justified dissatisfaction with the provisional liquidator's performance: *Hassan v Image Nominees Pty Ltd (in liq)* [2023] FCA 1645. See [6.900].

New Developments

Statistics

ASIC has released its annual report for 2023-2024. See [ND.170]:

