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EDITORIAL 47

ARTICLES

How to achieve a win for property owners and lessors – enforcing rights of possession under Pt 5.3A of the Corporations Act and relief against forfeiture – *Natalie Byrne*

The purpose of this article is to consider various scenarios where a corporate lessee is in default under a lease and the lessor seeks to exercise its rights against the lessee under the lease before, during and after an administration under Pt 5.3A of the *Corporations Act*. In doing so this article highlights the limitations of a court order pursuant to s 444F. It concludes that the lessee is unable to remain in occupation of premises under such an order in circumstances where the lessor has terminated the lease. This article proposes recommendations for reform in a bid to preserve the value of the lease asset being sold to a purchaser of the company's business and to protect the proprietary interests of owners and lessors. 49

Section 588FA, Burness, and Kassem: When are payments by third parties preferential? – *Jim Hartley*

The decisions of the Federal Court of Australia in *Burness v Supaproducts Pty Ltd* (2009) 259 ALR 339 and the Full Court of the Federal Court in *Federal Commissioner of Taxation v Kassem* (2012) 205 FCR 156 suggest that, where a person that is not the insolvent makes a payment to a creditor of the insolvent, that payment can be an unfair preference under s 588FA of the Corporations Act 2001 (Cth) even if the payment does not result in a diminution in the assets available to the insolvent's other unsecured creditors. This article submits that to that extent the decisions are inconsistent with earlier authority, and with authority on related principles (like the exception for payments on running accounts). A net diminution test also accords with the policy of avoidance provisions and finds support in academic commentary. It is submitted that a net diminution test is the best and most precise way of distinguishing between "unfair" and "fair" payments and therefore between those payments that have the requisite preferential effect and those that do not. 65

The enforcement of foreign judgments in avoidance proceedings in insolvency – *Joshua Kelly*

In the joint appeal in *Rubin v Eurofinance SA; New Cap Reinsurance (in liq) v Grant* [2012] UKSC 46, the Supreme Court of the United Kingdom was presented with a novel question: in the context of an insolvency (personal or corporate), when can a foreign judgment in avoidance proceedings (for example, proceedings to set aside preference payments or transactions at an undervalue) be recognised and enforced in England? In the view of Lord Collins, who authored the majority opinion of the court, the answer to that question lay in the common law, conflict of laws rules relating to the enforcement of foreign judgments. Lord Collins opinion has, consequently, shunned the approach taken by Lord Hoffman in *Cambridge Gas Transportation Co v Navigator Holdings plc* [2006] 3 WLR 689, which characterised foreign judgments in insolvency proceedings as sui generis and capable of recognition and enforcement under the theory of modified universalism.

This article analyses Lord Collins's judgment, and considers the status of modified universalism after *Rubin v Eurofinance SA; New Cap Reinsurance (in liq) v Grant* [2012] UKSC 46. 81

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