

CORPORATIONS LIST

The Honourable Justice Paul L G Brereton AM RFD
Commercial Equity Seminar for Practitioners
Supreme Court of NSW
Tuesday 26 April 2016

Outline

1. Common pitfalls and recurring issues
2. Schemes of arrangements
3. Indirect causation in shareholder class actions

Common pitfalls and recurring issues

Creditor's Statutory Demand

- Formal requirements:
 - The demand
 - The current form should be used
 - The demand must specify an address for service within the jurisdiction where it is served
 - The affidavit verifying
 - The affidavit must verify that the debt is due and payable
 - The deponent must state that he/she believes there is no genuine dispute
 - The affidavit must accompany the demand
 - Not required for judgment debts
- Because of s 459J(1)(a), defect in demand less likely to be problematic than defect in accompanying affidavit.

Non-compliant demands

- *Topfelt Pty Ltd v State Bank of NSW Ltd* (1993) 47 FCR 226 (Lockhart J): arguable that deficiencies in form may be so fundamental that demand is incapable of assuming that description within the meaning of the legislation.

- *Crema (Vic) Pty Ltd v Landmark Property Developments (Vic) Pty Ltd* [2006] VSC 338 (Dodds-Streeton J): where alleged deficiencies could have been raised on an application to set demand aside, they can only be raised in opposition to winding-up application by leave. Only fundamental flaws could deprive a demand of the status of even a purported statutory demand.
- *In the matter of Ege Foods Australia Pty Ltd* [2014] NSWSC 983: failure to comply with mandatory requirements of s 459E deprives demand of character of a compliant demand and renders it ineffective, and a demand does not come into effect for purposes of s 459F unless it is accompanied by an affidavit that complies with s 459E(3).

Rebutting the presumption

- In order to rebut the presumption of insolvency arising from failure to comply with a creditor's statutory demand, the company must adduce the "fullest and best" evidence of its financial position. Unaudited accounts, unverified claims of ownership or valuation, or assertions of solvency arising from a general review of the company's accounts, do not generally suffice.
 - *Commonwealth Bank v Begonia Pty Ltd* (1993) 11 ACSR 609
 - *Expile Pty Ltd v Jabb's Excavations Pty Ltd* [2003] NSWCA 163; (2003) 45 ACSR 711
- Common problems:
 - Accounts that omit the creditor's debt
 - Accounts that disavow responsibility
 - Unaudited accounts unsupported by vouchers, valuations etc
 - Bare assertions of solvency by a tame accountant based on director's say-so

Security Interests: s 588FL

- S 588FL: a PPSA security interest granted by a company vests in the company (for the benefit of creditors) if it is registered later than the later of 20

business days after it was created, or 6 months before the company goes into liquidation or administration.

- S 588FM: the Court may fix a later time:
 - if satisfied that the failure to register earlier was:
 - accidental or inadvertent or due to some other sufficient cause, or
 - not of such a nature as to prejudice creditors or shareholders, or
 - If on other grounds it is just and equitable to do so.
- A s 588FM order has no effect on the priority of security interests registered before the plaintiff's charge. Its only effect is that it does not vest in company but survives for benefit of chargee even if company goes into liquidation or administration within 6 months of registration.

Extension of time: s 588FM

- The interests of unsecured creditors are a relevant but not dominant consideration:
 - If solvency is established that is likely to be the end of the matter [*Investa Properties Pty Limited v Westpac Property Funds Management Limited* [2001] NSWSC 1089].
 - Otherwise, they are entitled to be heard against the making of an order, but the mere fact that an extension will deprive them of the benefit of the security interest vesting in the company is no objection to making an order, because the purpose of the discretion to fix a later time is to relieve a secured creditor from the consequences of accident or inadvertence. It would be contrary to the purpose of the section to treat the risk that unsecured creditors could be adversely affected by making an order as a dominant consideration [*In the matter of Appleyard Capital Pty Limited* [2014] NSWSC 782].
- Interests may be protected by joinder, notice without joinder, or reserving liberty to apply; however, generally applications should not be made ex parte.

Staying examinations

- *Re Mustang Marine Australia Services Pty Ltd* [2014] NSWSC 136

- A liquidator is entitled to use the examination process to obtain evidence and admissions for use in proceedings that are contemplated or pending.
- There are few circumstances in which it will be an abuse of process to do so.
 - Circumvention of restrictions on disclosure in substantive proceedings
 - Interference with preparation for hearing
 - Undermining credit and/or rehearsal of cross-examination
 - Usually best addressed and controlled by examining registrar on question-by-question basis

Special leave to distribute surplus: s 488

- Corporations Rules, r 7.9, requires publication of notice at least 14 days before hearing; does not state how
- Envisaged publication on insolvency notices website
- However, Corporations Regulation, reg 5.6.75, does not cover (as not in a relevant part of Act)
- Proposed amendment to harmonised Corporations Rules will provide for publication in a daily newspaper circulating generally in state or territory of principal or last known place of business
- Interim measure may safely assume that such publication will suffice

Trading trusts

- *Stansfield DIY Wealth Pty Ltd (in liq)* [2014] NSWSC 1484; (2014) 291 FLR 17; (2014) 103 ACSR 401
- Assets held on trust by company in liquidation are not property of the company available for distribution and liquidator is not entitled to sell them under s 477(2)(c)
- Liquidator of trustee company has power to administer the trust. But not where company ceases to be trustee by *ipso facto* clause and becomes mere bare trustee
- Trustee has right to be indemnified from trust assets in respect of trust liabilities

- Liquidator may be remunerated from trust assets for work referable to administration of trust, and – where sole function of company is to act as trustee – for general liquidation work
- Liquidator may be appointed as receiver of trust assets to give effect to former trustee’s right of indemnity

Remuneration

- *Independent Contractor Services Pty Ltd (No 2)* [2016] NSWSC 106
- Shortcomings of time-costing
 - *Re Carton Ltd* (1923) 39 TLR 194 (at 197)
 - *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] 1 BCLC 638
 - *Re Stockford Ltd; Korda* [2004] FCA 1682, 92004) 52 ACSR 279
 - *Conlan v Adams* [2008] WASCA 61, (2008) 65 ACSR 521
- Commission basis
 - Conventional - “percentage or otherwise”
 - Relevant considerations: s 473(10), s 504(2) – quality of work, risk and responsibility, value and nature of property
 - Inherently proportionate
 - Incentivizes creation of value

The tariff?

- *Re Carton Ltd* (1923) 39 TLR 194: claim for 5% on realisations and 5% on distributions would require special circumstances to justify “such a large commission”
- *AAA Financial Intelligence (No 2)* [2014] NSWSC 1270: realisations \$180,000 (\$104,000 already in hand); claimed \$49,915; allowed \$36,000 (20% of realisations)
- *Hellion Protection* [2014] NSWSC 1299: Realisations \$45,000 plus GEERS \$250,000; claimed \$47,399; would allow 10% for first \$50000 + 2.5% on GEERS, say \$20,000

- *Grammarkerr (No 2)* [2014] NSWSC 1405: Realisations \$495,000; initially claimed \$64,000 on time basis (12.5% of realisations); inclined to allow 10% on first \$100,000 and 5% on balance = \$27,750
- *ICS*: Realisations \$211,000 net \$130,000. Claimed \$49,510; indicative 2% on realisations and 15% on distributions = \$20,000, but allowed \$30,000 (14% of gross realisations)

Schemes of arrangements – current practice

Applications

- Dates may be obtained from Associate in advance
 - Court aims to accommodate commercial realities
- Judicial advice in trust schemes proceeds by analogy with s 411, often in conjunction with a company scheme in respect of a stapled security
- Two hearings:
 - Order for meeting and approval of explanatory statement
 - Approval of scheme

First hearing

- Whether scheme *could* be approved at final hearing if secures requisite majority at meeting – no insuperable impediment
- Commercial fairness and reasonableness:
 - Largely a matter for the members
 - However, the court will review the IER
- Exclusivity (no shop/no talk) provisions:
 - Duration
 - Fiduciary carve-out
- Break fees
 - <1% net equity
 - Not coercive

Explanatory statement

- Whether explanatory statement fairly and clearly puts proposal to members
- Disadvantages as well as advantages
- Implementation risk
- How to oppose
- Notice of second hearing
- Explanation of deemed warranty (and other burdensome provisions)
- Chair's letter
- Supplementary communications only with court's approval

Shareholder class actions – indirect 'market' causation

Is reliance required?

- *Janssen-Cilag Pty Limited v Pfizer Pty Ltd* (1992) 37 FCR 526: issue is causation, not reliance
- *Digi-Tech (Australia) Ltd v Brand* (2004) 62 IPR 184; *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653:
 - persons who claim damages for misleading conduct and allege that they incurred damage by acquiring something as a result of it, must prove that they were misled; otherwise they fail to establish that the damages were suffered "by" that conduct.
 - loss incurred by plaintiffs acting to their prejudice can only be caused "by" contravening conduct if plaintiffs are misled by it.
 - the class of cases in which reliance must be established is not restricted to cases of direct inducement but extends to all cases where conduct on the part of the plaintiff constitutes a link in the causation chain.

Subsequent cases

- *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 309 ALR 445: *Ingot* does not stand for any principle that it is insufficient to prove that some other

person relied on the alleged misleading conduct and that that person's reliance led to the plaintiff suffering loss, but only for the proposition that where misleading and deceptive conduct provides the opportunity for an investor to enter into a transaction, that investor will not be entitled to recover where the investor knows the truth of the underlying misrepresentation or was indifferent to its truth and proceeded nonetheless

- *McBride v Christie's Australia Pty Ltd* [2014] NSWSC 1729: Bergin CJ in Eq, *obiter*, appears to have been prepared to accept indirect causation in the form articulated by Hodgson JA in *Ingot*, which is difficult to reconcile with Giles & Ipp JJA.
- *Grant-Taylor v Babcock and Brown Ltd (in liq)* [2015] FCA 149; (2015) 322 ALR 723; (2015) 104 ACSR 195: Perram J accepted, *obiter*, that a party who acquires shares on a stock exchange could recover compensation for price inflation arising from a failure to disclose material required to be disclosed, so long as they were not themselves aware of the non-disclosed material. Appeal dismissed, without considering causation: *Grant-Taylor v Babcock & Brown Limited (in liquidation)* [2016] FCAFC 60 (21 Apr 16)
- *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94: none of the authorities relied upon by the respondents (which included *Ingot*) supported a submission that the applicants' market causation case was unarguable.
- *In the matter of HIH Insurance Limited* [2016] NSWSC 482

HIH Insurance Limited

- Two issues:
 - Is indirect causation available in principle?
 - Was it established on the facts?
- *Digi-Tech* and *Ingot* do not deny recoverability on the basis of indirect market causation.
 - Neither involved "market-based causation";
 - both were concerned with a scenario in which the alternatives were transaction or no transaction, in which the sole causative role of the contravening conduct was in the barest 'but-for' sense to contribute to the creation of the opportunity for the relevant transaction to take place;

- neither was concerned with a case in which the alternatives were a transaction at a lower or higher price, in which the contravening conduct had the necessary consequence that the higher price would obtain.

Digi-Tech and Ingot

- The policy of *Digi-Tech* and *Ingot* is to deny recovery where contravening conduct did not influence anyone (where no-one was misled by the contravening conduct), and to those who knew, or were indifferent to, the true position.
- The explanation of those decisions is that
 - if the contravening conduct in fact misleads no-one, then it cannot be said to have caused loss; and
 - where contravening conduct initiates or continues a process which culminates in an applicant making a decision to enter a transaction which incurs loss, a decision to enter into the transaction by an applicant who knows the true position or is indifferent to it is akin to voluntary assumption of risk and breaks the chain of causation as a *novus actus interveniens*, so that it could no longer be said the loss was incurred “by” the conduct.

Implications

- No presumption of reliance. Plaintiffs must still establish that contravening conduct caused shares to trade at an inflated price. However, this will be typically be intertwined with the quantification of damages, and may often be easy to infer.
- Measure is not “true value”, but price at which shares would otherwise have traded: must segregate impact of contravening conduct (only).
- Defendant would bear evidentiary onus to prove *novus actus*.
- NSW courts may have difficulty in applying in “no transaction” context, where contravening conduct is merely a contributing cause to availability of opportunity to invest. But see *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488; *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653 (per Hodgson JA); *McBride v Christie's Australia Pty Ltd* [2014] NSWSC 1729

Conclusion

- Judicial case management
- Specialist judges
- Flexible listing arrangements
- Quick hearings