Australian Institute of CREDIT MANAGEMENT

New South Wales Division
Credit Symposium
Wednesday 22 February 2018

Presenter Geoffrey McDonald
Barrister at law

Credit Symposium

Disclaimer: All material contained in this paper is written by way of general comment. No material should be accepted as legal advice and any reader wishing to act upon material contained in this paper should first contact Mr McDonald for properly considered professional advice, which take into account specific situations

OUTLINE

Outline

1.30pm Developments in the Law; Superior Courts, by McDonald

Developments in the Law; Ipso Facto clauses and Your Ts&Cs, by McDonald

Developments in the Law; Creditors Rights, by Rappoport

Statistics and reports, by McDonald

3.00pm afternoon tea

OUTLINE

3.30pm Case Study; Defeating a Liquidators claim of a preference, by McDonald

Developments in the Law; Safe Harbour, by McDonald

Developments in the Law; Privacy and eligible data breaches, by Rappoport

Proposals; Illegal Phoenix Activity, by McDonald

Proposals; Bankruptcy Amendment (Enterprise Incentives) Bill 2017, by McDonald

Law Reform (time permitting), by McDonald

5.30pm conclude Symposium and commence network session

OUTLINE

1.30PM: Developments in the Law; Superior Courts

I will briefly review the recent changes in the law and practice relating to credit, such as insolvency, debt collection, finance and general business law, including recent superior Court decisions affecting credit management and commenting upon the conduct of Credit managers and liquidators.

I will start with Superior Court decisions, such as any High Court cases over the last year.

Please ask questions as we go!

Please keep this Powerpoint file for future reference

Developments in the Law; Superior Courts

The only question in this appeal is whether the scheme established by the Security of Payment Act for claims for, and payment of, progress payments ousts the jurisdiction of the Supreme Court of New South Wales to make an order … to quash a determination by an adjudicator for error of law on the face of the record that is not a jurisdictional error. The answer is yes: the Security of Payment Act does oust that jurisdiction.

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4 (14 February 2018)

Developments in the Law; Superior Courts

Mr Compton's non est factum defence failed[7]; and, in the absence of any issue as to the quantum of the debt alleged by Ramsay, Hammerschlag J awarded judgment for Ramsay against Mr Compton in the amount of $9,810,312.33[8] ("the Judgment"), being the amount stated in a Certificate of Debt adduced by Ramsay in accordance with cl 12 of the Guarantee.

Ramsay Health Care Australia Pty Ltd v Compton [2017] HCA 28 (17 August 2017)

Developments in the Law; Superior Courts

On 7 July 2015, Mr Compton filed a notice stating grounds of opposition to the creditor's petition. Mr Compton contended that "no debt is or was really owed by [Mr Compton] to [Ramsay] because the [J]udgment is not founded on a debt that in truth and reality was or is owed by [Mr Compton] to [Ramsay]" and that "the Court should exercise its discretion to go behind the [J]udgment upon which the Creditor's Petition is based and consider whether the amount of the claimed debt as a whole is actually owed by [Mr Compton] to [Ramsay]".

Ramsay Health Care Australia Pty Ltd v Compton [2017] HCA 28 (17 August 2017)

Developments in the Law; Superior Courts

97. In particular, the power is not confined to circumstances of fraud, collusion, or miscarriage of justice.

Ramsay Health Care Australia Pty Ltd v Compton [2017] HCA 28 (17 August 2017)

Developments in the Law; Superior Courts

55. The scrutiny required by s 52 as to whether there is, in truth and reality, a debt owing to the petitioning creditor serves to protect the interests of third parties, particularly other creditors of the debtor. It is of critical importance to appreciate that such persons were not parties to the proceedings that resulted in the judgment debt.

Ramsay Health Care Australia Pty Ltd v Compton [2017] HCA 28 (17 August 2017)

Developments in the Law; Superior Courts

68. Accordingly, a Bankruptcy Court will usually have no occasion to investigate whether the judgment debt is a true reflection of the real debt. But where the merits of a claim and counterclaim have not been tested in adversarial litigation, a judgment debt will not have this practical guarantee of reliability.

Ramsay Health Care Australia Pty Ltd v Compton [2017] HCA 28 (17 August 2017)

Developments in the Law; Superior Courts

2. The Court of Appeal of the Supreme Court of Victoria held, by majority, that s 15(2) of the Foreign Judgments Act did not prevent the issue of a certificate even though the judgment in question could not be enforced by execution by reason of s 58(3) of the Bankruptcy Act[1]. In so holding, the Court of Appeal erred in its understanding of the operation of s 15(2) of the Foreign Judgments Act. Accordingly, the appeal must be allowed.

Talacko v Bennett [2017] HCA 15 (3 May 2017)

Developments in the Law; Superior Courts

18. Subsequent to the decisions, this Court decided Attwells v Jackson Lalic Lawyers Pty Ltd[13]. ...this Court held that the advocates' immunity from suit did not extend to negligent advice which leads to a compromise of litigation by agreement between the parties. ... by the same reasoning it is difficult to envisage how the immunity could ever extend to advice not to settle a case[14]. The reasoning of the majority in Attwells cannot be distinguished in this case. Attwells should not be reopened. The appeal must also be allowed.

Kendirjian v Lepore [2017] HCA 13 (29 March 2017)

Developments in the Law; Superior Courts

This was the plaintiffs' originating process brought pursuant to s 588FM of the Corporations Act 2001 (Cth) (the Act) and s 293(1)(a) of the Personal Property Securities Act 2009 (Cth) (PPSA) to have certain dates in May fixed as the time for the plaintiffs to register security interests in certain personal property. Those dates would then be the date of registration for the purposes of s 588FL(2)(b)(iv) of the Act. No party appeared to oppose the application. After considering the matter I made orders sought by the plaintiffs.

GREENLIGHT ASSET PTY LTD -v- WBK RICETTI PTY LTD [2017] WASC 278

Developments in the Law; Superior Courts

16 … However, if a court is not satisfied there is no risk that unsecured creditors could be adversely affected the unsecured creditors (or their representatives) are entitled to be heard against the making of an order. This may be sufficiently achieved by suspending the operation of the order or by imposing a term reserving leave to apply to set aside in the event of a liquidation or administration: see Re Appleyard [25]; Re Accodale Wines Australia Ltd [2016] NSWSC 1023 [19].

GREENLIGHT ASSET PTY LTD -v- WBK RICETTI PTY LTD [2017] WASC 278

Developments in the Law; Superior Courts

80. … the term was part of a " standard form contract " given that there was no dispute that it was prepared by or on behalf of APT without any prior discussion and negotiation with Ms Poole. She was afforded no opportunity to negotiate the term or any other term of the contract that she entered into with APT via its agent. The term was drafted with the apparent intention that it be of general commercial application and did not take into account the specific characteristics of any individual customer, such as Ms Poole. In effect, the term was offered on a "take it or leave it" basis, such that, apart from not entering into the contract at all, APT held all of the bargaining power relating to the transaction and, in particular, the Cancellation Term.

Poole v Australian Pacific Touring Pty Ltd [2017] FCA 424 (28 April 2017)

Developments in the Law; Superior Courts

10. NB2 and Mr Basile contend that … their appeals will be rendered nugatory if a stay is not granted. … NB2 has liabilities that exceed its assets by more than $11 million, and that Mr Basile has no significant assets. …If PT is permitted to enforce its judgment, it is likely that Mr Basile will be made bankrupt and that an order for the winding up of NB2 will be made. They contend that they would therefore lose control of the appeal, effectively rendering it nugatory.

NB2 Pty Ltd v P. T. Ltd [2017] NSWCA 257

Developments in the Law; Superior Courts

A "holding" DOCA was approved by the WASCA, in which the DOCA provided for a moratorium, six months of investigations and then for some restructuring proposal to be submitted to creditors (or not). There was no return promised to creditors, nor any property available for creditors.

Extending the convening period was not the only way to provide time for further investigations. The DOCA was valid

(*Mighty River v Hughes* [2017] WASCA 152)

Leave to appeal to the High Court

Developments in the Law; Superior Courts

The debt underlying the statutory demand was for a payment said to be owing under a contract relating to the cessation of employment of the company's chief financial officer. The company asserted that the debt was genuinely disputed because of an alleged breach of a non-disclosure confidentiality clause in the contract and therefore the balance of payments were no longer due.

Creata (Aust) Pty Ltd v Faull [2017] NSWCA 300

Developments in the Law; Superior Courts

14. **"Then let me put it to you this way. We understand from Gary [Faull] that the McDonald's contract is coming up for renewal. It's an important part of your business. He's [Gary Faull] shared certain information with me about Creata's and Norma's [Norma Rosenhain's] tax and business and affairs. If you don't withdraw your statutory demand then I will send affidavits that I've already prepared about those matters to the ATO, the IRS, the Police, the FBI and McDonalds."**

Creata (Aust) Pty Ltd v Faull [2017] NSWCA 300

Developments in the Law; Superior Courts

- **'Where the question of construction has any element of rational controversy to it, the court must exercise particular restraint';**
- **Section 459G proceedings 'are not ordinarily the occasion for the court to construe a contract where there are competing views about its meaning'; and**
- **'Competing but plausible submissions on the question of construction should have led to a finding that there was a dispute on that question and therefore dispute as to the existence of the debt the subject of the statutory demand'.**

Creata (Aust) Pty Ltd v Faull [2017] NSWCA 300

Developments in the Law; Superior Courts

'Ordinarily resident in Australia' to be able to appoint a trustee under the Bankruptcy Act

Compton v Ramsay Health Care Australia Pty Ltd [2017] FCAFC 221

leave to liquidators to join multiple defendants to a single proceeding where relief is sought in respect of voidable transactions

In the matter of Bias Boating Pty Ltd [2017] NSWSC 1524

s 33(1)(c) of the *Bankruptcy Act 1966* provides a bankruptcy court with power to extend the 60-day time limit laid down by s 139ZS(1A) of the Act.

Radnor Enterprises Pty Ltd & Ors v Nicholls (as Trustee of the Property of Boniface, a Bankrupt and Trustee of the Property of Ogston, A Bankrupt) [2017]

Developments in the Law; Ipso Facto clauses

Ipso facto clauses allow one party to a contract to terminate the agreement upon the occurrence of a specific event, often linked to insolvency and more particularly a formal insolvency appointment. The type of termination can occur regardless of the counterparty's continued performance of its obligations under the contract. These types of clauses are regularly found in leases, supply agreements, licences etc.

See papers

Developments in the Law; Ipso Facto clauses

Example;

Insolvency Event means, for the Customer, as applicable, being in liquidation or provisional liquidation, bankruptcy or under administration, …, taking any step that could result in the Company becoming an insolvent under administration (as defined in section 9 of the Corporations Act 2001)…

Developments in the Law; Ipso Facto clauses

Example;

(b) If the Customer fails to comply with any of the terms of these Conditions or in respect of any obligation to pay money to another Boral Group Company when due, suffers an Insolvency Event or makes any misrepresentation to a Boral Group Company, the balance of the Customer's account to the Supplier will become due and payable immediately.

Insolvency Law Reform Act Creditors Rights; 1 Sept 2017

Meetings

- ‘Virtual’ meetings permitted, as in bankruptcy but for single resolution only
- ASIC and AFSA may direct meetings and they may attend
- Specific power of the court to review resolutions determined by related party votes
- Similar convening etc. processes for corporate and personal
- Meetings of creditors are to be discretionary in most cases
  - creditors will be able to direct meetings be held depending on percentage of votes and value of claims
- No first meeting in a creditors’ voluntary liquidation (CVL)
  - 5% or more of unrelated creditors will be able to request a meeting within the first 2 weeks

Insolvency Law Reform Act Commencing 1 Sept 2017

Schedule 2— Insolvency Practice Schedule (Corporations)

90-35 Removal by creditors

Creditors may remove external administrator and appoint another

(1) The creditors may, by resolution at a meeting, remove the external administrator of a company if at least 5 business days' notice of the meeting is given to all persons who would be entitled to receive notice of creditors' meetings.

Developments in the law; Creditors Rights

Rights of Creditors; the law

See papers

Developments in the law; Creditors Rights

Questions;

1. **My name is not on the list of creditors and I want copies of the reports which were issued. What can I do to get copies?**
2. **The trustee/liquidator has not reported to me for ages. He is taking some legal action. I am a major creditor and want to know what is happening? What can I do?**
3. **If the response is that the trustee/liquidator has no funds, what can I do?**

Developments in the law; Creditors Rights

4. I want to inspect the POD of another creditor, because it is a competitor and I can find out about their pricing and other commercially sensitive information. Could I do that?

5. The bankrupt is not co-operating with the trustee and says that it is because of mental health issues and the lack of resources. I don't believe him/her. I have a personal guarantee. I want to inspect the documents of the trustee, such as the bankrupt's medical reports and A&L statements. Could I do that?

Statistics and reports

ARITA Technical Paper

General law independence standards of Australian liquidators and administrators

Mark Wellard, Legal Director, 18 October 2017

"If one were to reduce the judgment of O'Callaghan J in Ten Network to one key statement of principle, it might be the proposition that as a potential administrator, you can 'pre-plan' a process, but you cannot 'pre-pack' an outcome".

Statistics and reports

AFSA

Current Amounts

Statistics and reports

AICM

2017 Key Policy Positions

Case Study; Defeating a Liquidators claim of a preference

Please see Submissions made to the Court (papers)

The decision has not yet been reported, but Judgment was given in favour of the Defendant creditor

Developments in the Law; Safe Harbour

Please See papers

Developments in the Law; Privacy; eligible data breaches

Please see papers

Proposals; Illegal Phoenix Activity

ID numbers for directors as Turnbull government cracks down on phoenix companies

Each Australian company director will be assigned a unique identification number under tough new laws designed to prevent them deliberately scuttling their companies to avoid paying creditors and then re-appearing phoenix-like, debt-free.

Proposals; Illegal Phoenix Activity

ASIC RG109.6 Note: Phoenix activity does not have a statutory or legal definition. However, fraudulent or unlawful phoenix activity can be regarded as typically involving the transfer of assets (such as the business) of a company (the previous company) to a subsequent company in circumstances where the previous company:

Proposals; Illegal Phoenix Activity

- was unable to pay its debts; and

- may have been conducted in a manner so as to deprive unsecured creditors equal access to its assets; and

- there is a connection between the management or shareholding of the previous company and the subsequent company

Proposals; Illegal Phoenix Activity

COMBATTING ILLEGAL PHOENIXING

September 2017

See papers

Proposals; Bankruptcy Amendment (Enterprise Incentives) Bill 2017

“149(5) If the bankrupt becomes a bankrupt after the commencement of this subsection, the bankrupt is discharged at the end of the period of 1 year from the date on which the bankrupt filed his or her statement of affairs.”

Proposals; Bankruptcy Amendment (Enterprise Incentives) Bill 2017

“with all contribution assessment periods coming to an end:

(c) at the end of 3 years from the day on which the bankrupt becomes bankrupt”

Proposals; Bankruptcy Amendment (Enterprise Incentives) Bill 2017

***prescribed period*, in relation to a bankrupt, means the period from the date on which the bankrupt filed the bankrupt's statement of affairs to the commencement day.**

Proposals; Bankruptcy Amendment (Enterprise Incentives) Bill 2017

… the following provisions apply in relation to a person who is, immediately before the commencement day, a bankrupt:

(a) if the prescribed period in relation to the bankrupt is less than 1 year—the bankrupt is discharged from bankruptcy at the end of 1 year from the date on which the bankrupt filed the bankrupt's statement of affairs;

Law reform

Treasury Laws Amendment (Tax Transparency) Bill 2018

The proposed amendments will expand the exceptions to this confidentiality, allowing information relating to a taxpayer's tax debts to credit reporting bureaus if the taxpayer is within a specified class of entity which shall have the following characteristics:

Law reform

- Registered in the Australian Business Register (ie, have an Australian Business Number);
- Have a tax debt of which at least $10,000 is overdue for more than 90 days;
- Are not effectively engaging with the ATO to manage their tax debt; and
- Have not brought a complaint to the Inspector-General of Taxation which is still active.

Law reform

Productivity Commission Inquiry Report; Business Set-up, Transfer and Closure

Corporate insolvency

RECOMMENDATION 15.1

The pursuit of unfair preference claims should be limited to those within three months of insolvency and of material amounts. The duty to pursue unfair preferences should be explicitly removed unless there is a clear net benefit and it will not impede conclusion of the liquidation.

Law Reform

Preferential Payment Law Reform

"One idea that Geoffrey will explore is that the AICM ask the Government to change the law to the way one court has stated it to be! Yes, the famous Rexel decision was a major development in favour of creditors and against Liquidators allowing a creditor to offset the liquidators preferential payment claim against any remaining bad debt. Geoffrey thinks that over 75% of all clams being made by Liquidators would immediately fall away."

Law reform; AICM proposal

Preferential Payment Law Reform

The AICM strongly holds the position that the Corporations Act should be amended to:

- Limit the time period for liquidators to commence action to recover preference claims to 12 months from the commencement of the liquidation.

- Limit preference claims to circumstances where the creditor was aware of insolvency and used influence other than that available to creditors generally.

OUTLINE

5.30pm

Discussions and networking 5.30pm to 6.00pm+++

Future Assistance;
9th Floor Windeyer Chambers

Geoffrey McDonald, Barrister at law

Legal Services for credit managers;

- **Advice on responding to Liquidators demand for preferential payments**
- **Debt recovery work on contested cases, including guarantors (please ask your solicitor or collection agent to use me)**
- **Any commercial litigation**
- **Drafting new "Terms of Trade"**
- **Dealing with Liquidators**

Legal Advice

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