

INSOLVENCY, TAX (& EMPLOYMENT) LAW FOR ACCOUNTANTS

16 SEPTEMBER 2014

GEOFFREY MCDONALD,

BARRISTER and TRUSTEE IN BANKRUPTCY

GAVIN PARSONS,

LAWYER

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Presentations

2.00 pm; Developments in insolvency law; superior court decisions

2.30 pm; Personal Property Security law; common mistakes

3.00 pm; Accountants and “staff issues” (Employment law)

3.20 pm BREAK

3.40 pm Employment law cont'd

**4.00 pm Exposure of Accountants in assisting insolvents
(negligence)**

4.20 pm; Tax law; Directors Penalty Notices & Tax losses

5.00 pm; discussion group and conclusion 6.00 pm

Disclaimer

The content of this paper is a general guide only, and should not be relied on as legal advice. Individual cases were selected as examples to assist you in gaining a better understanding of the issues and should not be considered exhaustive on the topic.

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CASES FROM THE HIGH COURT

THE HIGH COURT HAS HELD THAT A LIQUIDATOR MAY DISCLAIM A LEASE THAT A COMPANY HAD GRANTED TO A TENANT, LEAVING THE TENANT TO PROVE FOR ANY LOSS IN THE WINDING UP.

A LEASE GRANTED BY COMPANY TO TENANT WAS A CONTRACT WITHIN MEANING OF S568(1) OF THE ACT. THE DISCLAIMER TERMINATED LANDLORD'S OBLIGATIONS AND TENANTS' CORRELATIVE RIGHTS UNDER LEASES.

CONSIDER THE RISKS ASSOCIATED WITH LENDING AGAINST THE SECURITY OF A LEASEHOLD INTEREST (E.G. A PUB WITH A LONG TERM LEASE). IF THE INTEREST IN THE LAND IS EXTINGUISHED BECAUSE THE LIQUIDATOR OF THE LANDLORD SIMPLY ISSUES A DISCLAIMER DOCUMENT, THE SECURITY BECOMES WORTHLESS.

WILLMOTT GROWERS GROUP INC V WILLMOTT FORESTS LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQ) [2013] HCA 51

CASES FROM THE HIGH COURT

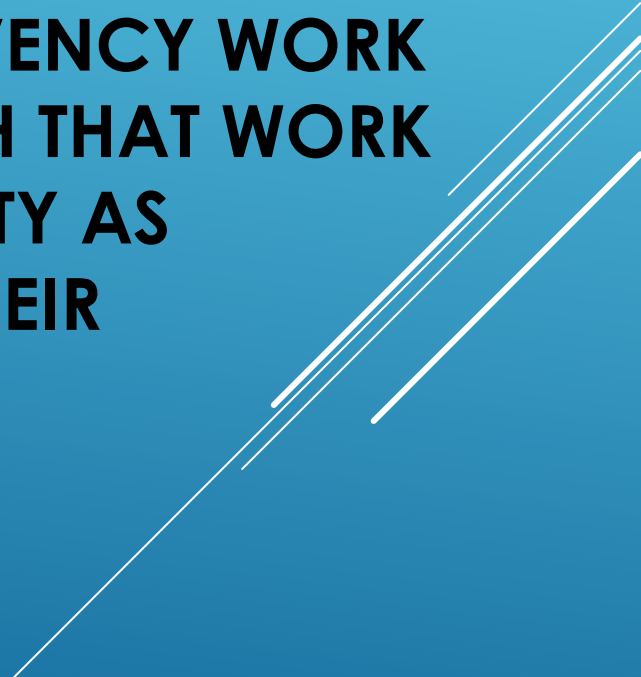
**EQUITY – EQUITABLE CHARGES AND LIENS – LIQUIDATOR 'S
EQUITABLE LIEN FOR COSTS, EXPENSES AND REMUNERATION –
WHERE ASSET REALISED BY LIQUIDATOR 'S EFFORTS IN PURSUING
LITIGATION – WHERE LIQUIDATOR ACTING WITH PROPRIETY AND
IN COURSE OF HIS DUTIES – WHETHER LIQUIDATOR ENTITLED TO
EQUITABLE LIEN OVER ASSET IN PRIORITY TO SECURED CREDITOR.**

STEWART V ATCO CONTROLS PTY LTD (IN LIQUIDATION) [2014] HCA 15

OTHER SUPERIOR COURTS

CASE 1; ADMINISTRATORS CONFLICT WITH THE REFERRER OF WORK

THE CONFLICT WAS SAID TO BE BETWEEN THE ADMINISTRATOR'S INTEREST IN RECEIVING FURTHER REFERRALS OF INSOLVENCY WORK FROM THE MAWSON GROUP AND THE REVENUE WHICH THAT WORK WOULD GENERATE, ON THE ONE HAND, AND THEIR DUTY AS LIQUIDATORS , ON THE OTHER, HAVING REGARD TO THEIR RESPONSIBILITIES TO THE CREDITORS



OTHER SUPERIOR COURTS

CASE 1

“61 ... LIQUIDATORS ARE THEMSELVES ENGAGED IN BUSINESS IN A COMPETITIVE ENVIRONMENT. THEY HAVE TO ATTRACT WORK. THIS MAKES IT ALMOST INEVITABLE THAT THEY WILL DEVELOP CONTACTS AND RELATIONSHIPS WITH THOSE WHO ARE ACTUAL OR PROSPECTIVE SOURCES OF REFERRALS. FURTHER, THE SUCCESS OR OTHERWISE OF LIQUIDATORS WILL DEPEND IN PART ON THEIR MAINTAINING GOOD PROFESSIONAL REPUTATIONS.”

OTHER SUPERIOR COURTS

CASE 1

LAST 2 YEARS; REFERRALS HAD LED TO SIX APPOINTMENTS.

2% OF THE REFERRALS IN THE TWO YEAR PERIOD, AT LEAST ONE OF THE REFERRALS INVOLVED A LARGE ADMINISTRATION.

IN THE 2012 FINANCIAL YEAR, THE REVENUE OF ABOUT \$500,000 COMPRISED JUST UNDER 10% OF THE REVENUE OF THE FIRM'S INSOLVENCY DIVISION, AND SOME 4.4% OF THE FIRM'S OVERALL REVENUE.

“95 ... I DO NOT CONSIDER THAT THE FAIR-MINDED OBSERVER WOULD REGARD REMUNERATION OF THE ORDER OF THAT RECEIVED BY ADMIN FROM THE MAWSON GROUP'S REFERRALS AS MODEST. MOST CREDITORS ARE LIKELY TO REGARD AMOUNTS SUCH AS \$250,000 AND \$500,000 AS SIGNIFICANT AND THE HYPOTHETICAL FAIR-MINDED OBSERVER IS LIKELY TO HAVE THE SAME VIEW. AT THE VERY LEAST, THE FAIR-MINDED OBSERVER MIGHT APPREHEND THAT THE ADMIN MAY NOT WISH TO PUT THEIR CONTINUED RECEIPT OF INCOME OF THESE PROPORTIONS IN JEOPARDY.”

OTHER SUPERIOR COURTS

CASE 1

“104. I AGREE ... THAT THE MAWSON GROUP APPEARS TO HAVE INFLUENCED THE SELECTION OF THE PERSONS WHO, AS LIQUIDATORS , WOULD INVESTIGATE THEIR OWN PRE-ADMINISTRATION CONDUCT...

IT IS COMMONPLACE FOR DISTRESSED COMPANIES TO RELY ON THEIR ADVISERS FOR THIS SELECTION. ...

BY ANALOGY WITH THE PRINCIPLE THAT LITIGANTS DO NOT GET TO CHOOSE THEIR JUDGES ...

OTHER SUPERIOR COURTS

CASE 1

“104. THE MAWSON GROUP’S INVOLVEMENT AS PARTICIPANTS IN PRE-ADMINISTRATION TRANSACTIONS, WHOSE LAWFULNESS WOULD BE INVESTIGATED, AND THEIR ROLE IN INFLUENCING THE APPOINTMENT OF THOSE WHO WOULD EXAMINE THEIR CONDUCT, WERE CAUSES FOR DISQUIET. ...

BY REASON OF THE MAWSON GROUP’S RELATIONSHIP WITH ADMIN, IT REGARDED ADMIN AS BEING POSSIBLY MORE AMENABLE TO ITS INTERESTS THAN OTHERS MIGHT BE.”

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION V FRANKLIN (LIQUIDATOR), IN THE MATTER OF WALTON CONSTRUCTIONS PTY LTD [2014] FCAFC 85

CASE 2

IF A COMPANY UNDER VOLUNTARY LIQUIDATION IS DEREGISTERED, THEN ON AN APPLICATION FOR RE-INSTATEMENT, THE PREVIOUS LIQUIDATOR DOES NOT AUTOMATICALLY RESUME OFFICE. WHILST IT IS PREFERABLE, OTHER THINGS BEING EQUAL, IT IS NOT AUTOMATIC

IN THE MATTER OF ERB INTERNATIONAL PTY LIMITED (DEREGISTERED) [2014] NSWSC 200 (10 MARCH 2014)

CASE 3

THE WORDS 'A DEMAND RELATING TO A DEBT' ORDINARILY HAVE A WIDER MEANING THAN SIMPLY 'A DEMAND FOR A DEBT', AND DO NOT ON THEIR FACE PRECLUDE A DEMAND FROM BEING MADE FOR PART OF THE DEBT.

CORPORATIONS ACT 2001 - SECT 459E; CREDITOR MAY SERVE STATUTORY DEMAND ON COMPANY

(1) A PERSON MAY SERVE ON A COMPANY A DEMAND RELATING TO (A) A SINGLE DEBT THAT THE COMPANY OWES TO THE PERSON, THAT IS DUE AND PAYABLE AND WHOSE AMOUNT IS AT LEAST THE STATUTORY MINIMUM; OR

CASE 4

PREFERENTIAL PAYMENT/UNCOMMERCIAL TRANSACTION

ON 1 MAY 2007 THE DEFENDANTS SENT A LETTER TO EMPLOY 96 IN WHICH IT CONFIRMED THE AMOUNT PRESENTLY OUTSTANDING, AND STATED THAT ITS FEES IN RESPECT OF SERVICES PROVIDED TO EMPLOY 96 HAD TO BE PREPAID AND THAT FUTURE WORK WOULD BE CHARGED AT "SPECIAL RATES" ("1 MAY LETTER"). THE RELEVANT SPECIAL RATES WERE DOUBLE THE RATES ORDINARILY CHARGED BY THE DEFENDANTS FOR SUCH SERVICES.

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HIS HONOUR FOUND THAT THE SERVICES PROVIDED BY THE DEFENDANTS TO EMPLOY 96 UNDER THE 1 MAY LETTER AMOUNTED TO A BARGAIN OF SUCH MAGNITUDE THAT IT COULD NOT BE EXPLAINED BY NORMAL COMMERCIAL PRACTICE AND WERE THEREFORE UNCOMMERCIAL TRANSACTIONS.

IN THE MATTER OF EMPLOY (NO 96) PTY LIMITED (IN LIQUIDATION) [2013] NSWSC 61 (8 FEBRUARY 2013)

CASE 5

LIQUIDATOR'S POWERS

THIS CASE INVOLVED AN INTERLOCUTORY APPLICATION FOR ORDERS RESTRAINING LIQUIDATORS FROM PROCEEDING WITH OFFER TO SELL SECOND DEFENDANT'S INTEREST IN JOINT VENTURE PROJECT TO THIRD DEFENDANT.

THE COURT FOUND IN FAVOUR OF THE LIQUIDATOR AND COMMENTED THAT;

A LIQUIDATOR IS NOT REQUIRED TO OBTAIN THE "BEST POSSIBLE PRICE" PER SECTION 420A

IN EVALUATING THE CONDUCT OF A LIQUIDATOR, IT IS IMPORTANT TO REMEMBER THAT A LIQUIDATOR IS REQUIRED TO MAKE PRACTICAL COMMERCIAL JUDGMENTS. ... THAT A DECISION IS NOT FULLY REASONED OR SUPPORTED BY THE FULLEST INVESTIGATION DOES NOT MEAN THAT IT SHOULD BE SECOND-GUESSED BY THE COURT.

36.. IN CIRCUMSTANCES WHERE THE LIQUIDATORS WERE USING THEIR COMMERCIAL JUDGMENT AND BUSINESS ACUMENT (SIC.), I DO NOT BELIEVE THAT THE PLAINTIFFS HAVE ESTABLISHED A PRIMA FACIE CASE THAT THE LIQUIDATORS' CONDUCT WAS UNREASONABLE ... OR OTHERWISE DEFECTIVE

WENTWORTH METALS GROUP PTY LTD V LEIGH AND OWEN (AS LIQUIDATORS OF BONYTHON METALS GROUP PTY LTD): IN THE MATTER OF BONYTHON METALS GROUP PTY LTD (IN LIQ) [2013] FCA

CASE 6

RECEIVER SOUGHT DIRECTIONS ON SALE USING THE BROKER PREVIOUSLY EMPLOYED BY THE COMPANY PRIOR TO HIS APPOINTMENT.

“HAVING CONSIDERED THE EVIDENCE AND, IN PARTICULAR, THE NATURE AND EXTENT OF INQUIRIES AS TO THE ORIGINAL APPOINTMENT OF THE BROKER AND THE STEPS TAKEN BY IT TO PROCURE A PURCHASER FOR THE VESSEL, I AM SATISFIED THAT THE DIRECTION, SUBSTANTIALLY AS SOUGHT, SHOULD BE GIVEN. “


DEPUTY COMMISSIONER OF TAXATION V FAST FERRIES PTY LTD (RECEIVER AND MANAGER APPOINTED) (IN LIQ), IN THE MATTER OF FAST FERRIES PTY LTD [2013] FCA 1286 (21 NOVEMBER 2013)

CASE 7

DEBT COLLECTION AND STATUTORY DEMANDS

A&T SERVED A STATUTORY DEMAND ON BRITTEN-NORMAN PTY LIMITED (BRITTEN-NORMAN) IN RESPECT OF OUTSTANDING PAYMENTS FOR BRITTEN-NORMAN'S LEASE OF THE SURVEILLANCE MANAGEMENT SYSTEM MK II (SURVEILLANCE SYSTEM) FROM A&T. BRITTEN-NORMAN APPLIED TO SET ASIDE THAT STATUTORY DEMAND, ON THE BASIS THAT IT HAD AN "OFFSETTING CLAIM".

BRITTEN-NORMAN ALLEGED THAT IT WAS NOT INDEBTED TO A&T BECAUSE A&T ENGAGED IN MISLEADING AND DECEPTIVE CONDUCT. IT CLAIMED THAT THE MANAGING DIRECTOR OF A&T, HAD MADE REPRESENTATIONS ABOUT THE ACCURACY OF THE SYSTEM. THESE ALLEGATIONS WERE NOT SUPPORTED BY DOCUMENTARY EVIDENCE.



INSOLVENCY & TAX LAW FOR ACCOUNTANTS

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... EVEN IF THERE WAS EVIDENCE THAT CASTS DOUBT, OR SIGNIFICANT DOUBT, ON THE CONTENTION THAT THERE IS A DISPUTED DEBT OR OFFSETTING CLAIM, THAT IS NOT SUFFICIENT BASIS FOR REJECTING AN APPLICATION UNDER SECTION 459H

IN BRITTEN-NORMAN PTY LTD V ANALYSIS & TECHNOLOGY AUSTRALIA PTY LTD [2013] NSWCA 344

APPLICATIONS TO SET ASIDE DOCAS AND PIA'S

CASE 8

AS A JUDGE HAD SAID IN ANOTHER CASE, '3 CENTS [UNDER A DEED] AS AGAINST NO CENTS [UNDER A LIQUIDATION]' WAS A VALID DECISION FOR CREDITORS TO MAKE:

**LEARMONT V LOVE CHILDCARE PTY LTD [2012] NSWSC 1322.
(COUNSEL FOR COMPANY WAS MCDONALD, G.D.)**

CASE 9

PERSONAL INSOLVENCY AGREEMENTS UNDER PART X OF THE BANKRUPTCY ACT OFFERING ESTIMATED RETURNS FROM \$0.001 TO \$0.03 IN THE DOLLAR WERE SET ASIDE.

THE COURT SAID THAT 'THE RETURN IS ESSENTIALLY NIL AND TOTALLY DISPROPORTIONATE TO THE DEBTS OWING WHICH RANGE FROM \$13.7M TO \$56M'.

CASE 9

ONE CREDITOR WAS ADMITTED TO VOTE FOR AN AMOUNT – \$7 MILLION – WELL IN EXCESS OF WHAT COULD BE REGARDED AS A GENUINE ESTIMATE IN ITS CLAIM FOR DAMAGES.

THE COURT TOOK INTO ACCOUNT THAT THE CREDITOR BRINGING THE CHALLENGE WAS OFFERING TO FUND A TRUSTEE TO CONDUCT SUCH INVESTIGATIONS.

ONESTEEL TRADING V D'ARRIGO [2013] FCCA 1019.

CASE 10

THE COURT SET ASIDE A PIA AND COMMENTED ON THE CLAIM OF

NITZACHON'S CLAIMED DEBT OF \$1,602,575 REPRESENTS OVER 80% OF THE VALUE OF UNSECURED CREDITORS

IN RESPONSE TO A SUBPOENA ADDRESSED TO NITZACHON, MR MORRISON, IN HIS CAPACITY AS DIRECTOR, SENT A LETTER TO THE REGISTRAR OF THE COURT STATING THAT:

NITZACHON "ACTED AS AN INTERMEDIARY BETWEEN LENDER AND BORROWER AND DID NOT GENERATE ANY TAXABLE INCOME FOR THE PERIOD".

THERE WAS A CLAIM, BY FRIENDS THAT THEY HAD A SECOND MORTGAGE OVER THE PROPERTY, SECURED BY A CAVEAT. AN EMAIL SUGGESTS THAT THEY HAD LODGED A CAVEAT ON THE TITLE TO THE HAWTHORN ROAD PROPERTY FOR “ASSET PROTECTION” REASONS CONNECTED, IN SOME WAY, TO THE FIRST RESPONDENT’S MATRIMONIAL AFFAIRS.

“THE EVIDENCE PRESENTS A DISTURBING AND CONTRADICTIONARY PICTURE”

NEW AGE CONSTRUCTIONS (NSW) PTY LTD V ETLIS, IN THE MATTER OF ETLIS [2013] FCA 884

CASE 11

MR SABIR HUSSAIN WAS CONVICTED OF FOUR OFFENCES UNDER THE BANKRUPTCY ACT 1966 IN THE SYDNEY DOWNING CENTRE LOCAL COURT, ON 11 NOVEMBER 2013.

THE OFFENCES RELATED TO MR HUSSAIN INCURRING DEBT WHICH HE HAD NO EXPECTATION OF BEING ABLE TO REPAY, FAILING TO DISCLOSE INFORMATION AND LEAVING AUSTRALIA WITHOUT THE PERMISSION OF HIS TRUSTEE.

265 (8) OF THE BANKRUPTCY ACT

A PERSON WHO HAS BECOME A BANKRUPT AND, WITHIN 2 YEARS BEFORE HE OR SHE BECAME A BANKRUPT ..., **HAS CONTRACTED A DEBT PROVABLE IN THE BANKRUPTCY WITHOUT HAVING AT THE TIME OF CONTRACTING IT ANY REASONABLE OR PROBABLE GROUND OF EXPECTATION, AFTER TAKING INTO CONSIDERATION HIS OR HER OTHER LIABILITIES (IF ANY), OF BEING ABLE TO PAY THE DEBT**, IS GUILTY OF AN OFFENCE

CASE 12

TAKING A COMPANY OUT OF LIQUIDATION

“THE DIRECTORS WISH TO HAVE THE WINDING UP TERMINATED AND THE COMPANY RETURNED TO THEIR CONTROL, IN ORDER TO RESUME TRADING IN THE GLASS CRUSHING AND RECYCLING BUSINESS, AND TO TAKE ADVANTAGE OF THE SUBSTANTIAL OPERATING LOSSES THAT APPEAR TO BE AVAILABLE IN THE COMPANY AND COULD BE APPLIED AGAINST FUTURE PROFITS FOR TAX PURPOSES.”

CASE 12

“HOWEVER, A CONTRIBUTION OF \$20,000 PROVIDES SOME COMFORT THAT IT WILL HAVE ASSETS WITH WHICH TO SATISFY LIABILITIES THAT MAY BE INCURRED IN THE SHORT TERM. THIS CONTRIBUTION MOVES THE STATE OF AFFAIRS FROM ONE OF "BARE SOLVENCY" TO ONE IN WHICH THE COMPANY HAS DEMONSTRATED SOLVENCY IN SUBSTANCE.”

IN THE MATTER OF GLASS RECYCLING PTY LTD (ACN 001 332 654) [2014] NSWSC 439

PERSONAL PROPERTY SECURITIES ACT COMMON MISTAKES

1. TERMS OF SECURITY AGREEMENT
 2. FAILURE TO REGISTER (PERFECT)
 3. HIRE AGREEMENTS OR LEASES ARE SECURITY AGREEMENTS (EXCEPT)
 4. ON-LEASED EQUIPMENT
- 

COMMON MISTAKES

- TERMS OF SECURITY AGREEMENT

PERSONAL PROPERTY SECURITIES ACT 2009 - SECT 12

MEANING OF SECURITY INTEREST

(1) A SECURITY INTEREST MEANS AN INTEREST IN PERSONAL PROPERTY PROVIDED FOR BY A TRANSACTION THAT, IN SUBSTANCE, SECURES PAYMENT OR PERFORMANCE OF AN OBLIGATION (WITHOUT REGARD TO THE FORM OF THE TRANSACTION OR THE IDENTITY OF THE PERSON WHO HAS TITLE TO THE PROPERTY).

COMMON MISTAKES

PERSONAL PROPERTY SECURITIES ACT 2009 - SECT 33

(1) A SECURITY INTEREST IN PROCEEDS IS PERFECTED IF THE SECURITY INTEREST IN THE ORIGINAL COLLATERAL IS PERFECTED BY A REGISTRATION

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PERSONAL PROPERTY SECURITIES ACT

COMMON MISTAKES

[14]THE LENGTH OF THE DELAY PRIOR TO REGISTRATION OF THE SECURITY INTEREST IS A RELEVANT FACTOR IN THE EXERCISE OF THE COURT'S DISCRETION UNDER S 588FM: DEMPSEY RESOURCES PTY LTD V CONTINENTAL COAL LTD ABOVE. HERE I CONSIDER THAT THE DELAY OF SOME TWO MONTHS BETWEEN THE LAST DAY OF THE 20 BUSINESS DAY PERIOD AND THE DATE OF REGISTRATION IS NOT A PARTICULARLY LONG PERIOD, AND NOTE THAT GILMOUR J TOOK A SIMILAR VIEW IN DEMPSEY RESOURCES ABOVE.

IN THE MATTER OF BARCLAYS BANK PLC [2012] NSWSC 1095 (24 AUGUST 2012)

ALSO SEE APEX GOLD PTY LTD ACN 124 893 778 [2013] NSWSC 881 (25 JUNE 2013)

PERSONAL PROPERTY SECURITIES ACT

COMMON MISTAKES

S12 (3) A SECURITY INTEREST ALSO INCLUDES THE FOLLOWING INTERESTS, WHETHER OR NOT THE TRANSACTION CONCERNED, IN SUBSTANCE, SECURES PAYMENT OR PERFORMANCE OF AN OBLIGATION:

(C) THE INTEREST OF A LESSOR OR BAILOR OF GOODS UNDER A PPS LEASE.

PERSONAL PROPERTY SECURITIES ACT

COMMON MISTAKES

PERSONAL PROPERTY SECURITIES ACT 2009 - SECT 13

(1) A PPS LEASE MEANS A LEASE OR BAILMENT OF GOODS:

(A) FOR A TERM OF MORE THAN ONE YEAR;

(B) FOR AN INDEFINITE TERM* (EVEN IF THE LEASE OR BAILMENT IS DETERMINABLE BY ANY PARTY WITHIN A YEAR OF ENTERING INTO THE LEASE OR BAILMENT); OR

(C) ... AUTOMATICALLY RENEWABLE

PERSONAL PROPERTY SECURITIES ACT COMMON MISTAKES

- (E) FOR GOODS THAT MAY OR MUST BE DESCRIBED BY SERIAL NUMBER IN ACCORDANCE WITH THE REGULATIONS, IF THE LEASE OR BAILMENT IS:**
- (I) FOR A TERM OF 90 DAYS OR MORE; OR**
 - (II) LESS THAN 90 DAYS, BUT IS RENEWABLE**

PERSONAL PROPERTY SECURITIES ACT

COMMON MISTAKES

S13 (2) HOWEVER, A PPS LEASE DOES NOT INCLUDE:

(A) A LEASE BY A LESSOR WHO IS NOT REGULARLY ENGAGED IN THE BUSINESS OF LEASING GOODS; OR

(B) A BAILMENT BY A BAILOR WHO IS NOT REGULARLY ENGAGED IN THE BUSINESS OF BAILING GOODS; OR

(C) A LEASE OF CONSUMER PROPERTY AS PART OF A LEASE OF LAND WHERE THE USE OF THE PROPERTY IS INCIDENTAL TO THE USE AND ENJOYMENT OF THE LAND;

PERSONAL PROPERTY SECURITIES ACT **COMMON MISTAKES**

BACKGROUND

**QUEENSLAND EXCAVATION SERVICES PTY LTD (QES)
PURCHASED THREE CATERPILLAR CONSTRUCTION VEHICLES (ON
FINANCE).**

**QES LEASED THE CATERPILLARS TO MAIDEN. THE LEASE WAS NOT
IN WRITING AND QES DID NOT REGISTER ON THE PPSR**

PERSONAL PROPERTY SECURITIES ACT COMMON MISTAKES

MAIDEN OBTAINED FINANCE FROM FAST FINANCIAL SOLUTIONS PTY LTD ('FAST') AND GAVE FAST SECURITY OVER ITS ASSETS INCLUDING THE CATERPILLARS. FAST REGISTERED ITS SECURITY OVER THE CATERPILLARS ON THE PPSR.

IN 2012 MAIDEN WENT INTO LIQUIDATION. THE COURT HAD TO DETERMINE WHETHER FAST OR QES HAD THE PRIORITY INTEREST?

PERSONAL PROPERTY SECURITIES ACT

COMMON MISTAKES

BRERETON J SAID: [40] HOWEVER, QES HAS NOT REGISTERED ITS SECURITY INTEREST IN RESPECT OF ANY OF THE CATERPILLARS, AND ITS SECURITY INTEREST IS THEREFORE NOT PERFECTED. IN THOSE CIRCUMSTANCES, S 55(3) APPLIES, SO THAT FAST'S PERFECTED SECURITY INTEREST IN THE CATERPILLARS HAS PRIORITY OVER QES' UNPERFECTED SECURITY INTEREST IN THEM.

NSW SUPREME COURT CASE OF MAIDEN CIVIL V QES [2013] NSWSC 852[1].

INSOLVENCY & TAX LAW FOR ACCOUNTANTS

GEOFFREY MCDONALD, BARRISTER/TRUSTEE AND GAVIN PARSONS, LAWYER

ACCOUNTANTS & STAFF ISSUES

PAPER ON EMPLOYMENT LAW

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INSOLVENCY & TAX LAW FOR ACCOUNTANTS

GEOFFREY MCDONALD, BARRISTER/TRUSTEE AND GAVIN PARSONS, LAWYER

EXPOSURE OF ACCOUNTANTS IN ASSISTING INSOLVENTS **(NEGLIGENCE)**

TAX LAWS (TO BE CONSIDERED)

CRIMINAL CONDUCT RE TAX

PEARCE V THE QUEEN [2005] WASCA 74 (15 APRIL 2005)

ADVICE (OR FAILURE TO ADVISE) WHETHER INSOLVENT PHOENIX COMPANY;

THE NEW SOUTH WALES SUPREME COURT HAS FOUND EIGHT DIRECTORS OF UNRELATED COMPANIES TO HAVE ACTED IN BREACH OF THE CORPORATIONS ACT BY ENGAGING IN WHAT ASIC REGARDS AS ILLEGAL 'PHOENIX' ACTIVITY AND THAT THEIR LEGAL ADVISER, MR TIMOTHY DONALD SOMERVILLE, ALSO CONTRAVENED THE CORPORATIONS ACT BY BEING INVOLVED IN THE DIRECTORS' BREACHES.

CONFLICTS OF INTEREST

EXPOSURE OF ACCOUNTANTS IN ASSISTING INSOLVENTS (NEGLIGENCE)

LEGAL ADVICE

PREFERENTIAL PAYMENTS

BEVERIDGE V WHITTON [2001] NSWCA 6 (5 FEBRUARY 2001)

26 TO MY MIND IT IS IRRELEVANT THAT IN FACT, AS MATTERS TURNED OUT, THE DEFENDANT'S SERVICES "ACHIEVED NOTHING OTHER THAN TO THE DETRIMENT OF THE OTHER CREDITORS OF THE COMPANY".

29 THE LIQUIDATOR DID NOT EXPLAIN THE BASIS FOR HIS SUBMISSION THAT THE VICTORIAN COURT OF APPEAL IN V R DYE & CO V PENINSULA HOTELS PTY LTD (IN LIQ) [1993] 3 VR 201 AT 214 WAS WRONG

ENGAGEMENT TERMS

ACCOUNTANTS NEGLIGENCE

“5. BENTLEYS SOUGHT TO RECOVER FEES FOR WORK DONE IN RELATION TO THE TAX AUDIT. THALIA CLAIMED THAT BENTLEYS WERE NEGLIGENT IN FAILING TO RECONCILE INCONSISTENCIES BETWEEN THE BAS’S AND THE ITR’S, WHICH WAS A SUBSTANTIAL REASON FOR THE ATO DETERMINING TO CONDUCT THE TAX AUDIT”

ACCOUNTANTS NEGLIGENCE

“33. AN ACCOUNTANT OWES A DUTY OF CARE TO HER OR HIS CLIENTS, WHICH REQUIRES THE ACCOUNTANT TO EXERCISE THE CARE AND SKILL OF AN ORDINARILY SKILLED ACCOUNTANT.

ACCOUNTANTS NEGLIGENCE

“42. THE MAGISTRATE CORRECTLY CONCLUDED THAT BENTLEYS WAS NEGLIGENT IN FAILING TO IDENTIFY THE KONE INVOICES AND CORRECT OR EXPLAIN TO THE ATO THE DISCREPANCY WHICH RESULTED BETWEEN THE BAS’S AND THALIA’S 2008 ITR. THE SIZE OF THE INVOICES WAS SIGNIFICANT ENOUGH TO REVIEW. ON THEIR FACE, THE INVOICES WOULD HAVE INDICATED TO A REASONABLE ACCOUNTANT THAT THEY WERE CAPITAL IN NATURE.”

ACCOUNTANTS NEGLIGENCE

45. WHERE AN ACCOUNTANT'S NEGLIGENCE IN COMPLETING TAX RETURNS RESULTS IN AN UNDERPAYMENT OF TAX, THE CLIENT MAY RECOVER DAMAGES FOR THE INTEREST ACCRUED ON THE TAX OWING OR FOR ADDITIONAL TAX OR PENALTIES.

QUERY; THE COSTS ASSOCIATED WITH A TAX AUDIT

ACCOUNTANTS NEGLIGENCE

56. IN DETERMINING THE REASONS FOR THE AUDIT, THE MAGISTRATE CONCLUDED THAT THE MAIN TRIGGER FOR THE AUDIT RELATED TO GST CREDITS CLAIMED WHICH WERE OUTSIDE THE ATO BENCHMARK FOR COMMERCIAL LEASING ENTERPRISES.

ACCOUNTANTS NEGLIGENCE

THE EVIDENCE WHICH I HAVE SUMMARISED IS THAT THALIA'S BOOKKEEPER WOULD PREPARE ACCOUNTING RECORDS FROM INVOICES AND OTHER DATA. THOSE RECORDS WOULD BE PROVIDED TO BENTLEYS FOR THE PREPARATION OF THE BAS. BENTLEYS ROLE DID NOT INCLUDE A BOOKKEEPING FUNCTION, NOR AN AUDITING FUNCTION. BOTH BENTLEYS AND THALIA WERE AWARE THAT THALIA'S BOOKKEEPING WAS DEFICIENT & THAT THE KONE INVOICES WERE ORIGINALLY MISALLOCATED BY THALIA'S BOOKKEEPERS.

INSOLVENCY & TAX LAW FOR ACCOUNTANTS

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ACCOUNTANTS NEGLIGENCE

**CLAIM BY DIRECTOR AGAINST PUBLIC COMPANY'S ACCOUNTANT
- DOCUMENTS LODGED WITH ASIC BY ACCOUNTANT
INCORRECTLY SHOWING DIRECTORS AND SECRETARY APPOINTED
ALTHOUGH THEY HAD NOT CONSENTED - ACCOUNTANT KNEW
OFFICERS HAD NOT GIVEN WRITTEN CONSENTS - ASIC
SUBSEQUENTLY DISQUALIFIED DIRECTOR FROM MANAGING
CORPORATIONS BASED IN PART ON INCORRECT FORMS LODGED
BY ACCOUNTANT - PRIMARY JUDGE FOUND DIRECTOR
INSTRUCTED ACCOUNTANT TO LODGE FORMS WITHOUT FIRST
OBTAINING WRITTEN CONSENTS - PRIMARY JUDGE FOUND NO
BREACH OF DUTY AND NO LOSS - APPEAL DISMISSED BECAUSE NO
LOSS - BOORER V HLB MANN JUDD (NSW) PTY LTD [2014] NSWCA 100**

INSOLVENCY & TAX LAW FOR ACCOUNTANTS

GEOFFREY MCDONALD, BARRISTER/TRUSTEE AND GAVIN PARSONS, LAWYER

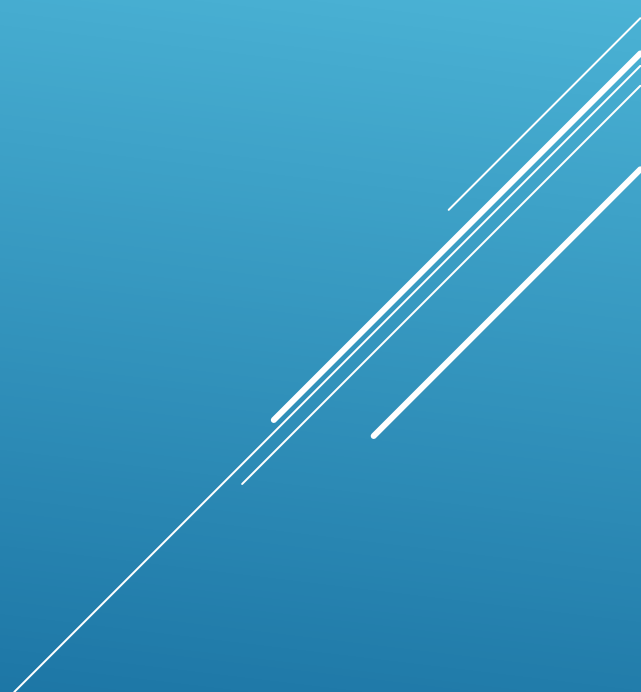
DIRECTOR'S PERSONAL EXPOSURE;

PERSONAL GUARANTEE

TAX LAW

INSOLVENT TRADING

INDUSTRY OR EMPLOYMENT LAW



TAX LAW; DIRECTORS PENALTY NOTICES

1. SUPERANNUATION

2. ESTIMATES AND DIRECTOR PENALTY NOTICES

3. PAYG WITHHOLDING NON-COMPLIANCE TAX

4. RIGHT OF INDEMNITY AND CONTRIBUTION

5. RECOVERING DIRECTOR PENALTIES



TAX LAW; DIRECTORS PENALTY NOTICES

-WHILE A DIRECTOR PENALTY IS AUTOMATICALLY IMPOSED, THE COMMISSIONER MUST FOLLOW A SPECIFIC PROCEDURE BEFORE BEING ENTITLED TO COMMENCE PROCEEDINGS TO RECOVER THAT DEBT.

-THIS DOES NOT PREVENT THE COMMISSIONER FROM TAKING OTHER ACTION SUCH AS ISSUING GARNISHEE NOTICES ETC.

-THE NOTICE IS “GIVEN” ON THE DAY WHEN IT IS POSTED, AND IS SENT TO A DIRECTOR’S ADDRESS AS LISTED IN THE COMPANY RECORDS MAINTAINED BY ASIC.

TAX LAW; DIRECTORS PENALTY NOTICE

-THE PENALTY AND THE DIRECTOR'S PERSONAL LIABILITY IS REMITTED IF, WITHIN THE SPECIFIED TIME PERIOD, THE COMPANY COMPLIES WITH ITS OBLIGATIONS (I.E. PAYS THE TAX OR APPOINTS AN ADMINISTRATOR OR A LIQUIDATOR).

-HOWEVER, THE DIRECTOR PENALTY WILL NOT BE REMITTED BY APPOINTING AN ADMINISTRATOR OR A LIQUIDATOR WHERE THE COMPANY HAS FAILED TO REPORT ITS PAYG WITHHOLDING LIABILITY OR SUPERANNUATION GUARANTEE SHORTFALL WITHIN THREE MONTHS OF THE LODGEMENT DAY.

TAX LAW; DIRECTORS PENALTY NOTICES

- THE LAW ALSO APPLIES TO DIRECTOR LIABILITIES THAT WERE IN EXISTENCE BEFORE THE NEW LEGISLATION COMMENCED (IF THOSE LIABILITIES WERE NOT EXTINGUISHED).

- FOR SUPERANNUATION IT APPLIES TO LIABILITIES THAT ARISE AFTER 30 JUNE 2012.

DEFENCES

TAX LAW; DIRECTORS PENALTY NOTICES

NEW DIRECTORS

- NEWLY APPOINTED DIRECTORS HAVE 30 DAYS BEFORE THEY BECOME LIABLE TO PENALTIES EQUAL TO:
ALL THEIR COMPANY'S OUTSTANDING PAYG
WITHHOLDING LIABILITIES, AND ANY OUTSTANDING SGC
LIABILITIES THAT AROSE AFTER 30 JUNE 2012.

TAX LAW; USE AND SALE OF TAX LOSSES

CONTINUITY OF OWNERSHIP, CONTROL, AND SAME BUSINESS TESTS

TO DEDUCT A TAX LOSS A COMPANY MUST EITHER:
SATISFY BOTH THE CONTINUITY OF OWNERSHIP TEST (COT)
AND THE CONTROL TEST, OR
SATISFY THE SAME BUSINESS TEST (SBT).

TAX LAW; USE AND SALE OF TAX LOSSES

CGT AND DEBT FORGIVENESS

A DEBT IS FORGIVEN IF YOU ARE FREED FROM THE OBLIGATION TO PAY IT. A DEBT IS A COMMERCIAL DEBT IF PART OR ALL OF THE INTEREST PAYABLE ON THE DEBT IS, OR WOULD BE, AN ALLOWABLE DEDUCTION.

A FORGIVEN AMOUNT MAY REDUCE (IN THE FOLLOWING ORDER) YOUR:

- PRIOR INCOME YEAR REVENUE LOSSES**
- NET CAPITAL LOSSES FROM EARLIER YEARS**
- DEDUCTIBLE EXPENDITURE, AND**
- COST BASE AND REDUCED COST BASE OF ASSETS.**

INSOLVENCY & TAX LAW FOR ACCOUNTANTS

GEOFFREY MCDONALD, BARRISTER/TRUSTEE AND GAVIN PARSONS, LAWYER

TAX LAW; USE AND SALE OF TAX LOSSES

DEFERRAL NOT AVOIDANCE

COMMERCIAL ARRANGEMENT

RISK V CONTROL

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INSOLVENCY & TAX LAW FOR ACCOUNTANTS

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