Readers faced with a similar situation would be well advised to ensure that any costs incurred in defending an unfair preference claim are taken into account in the terms of settlement, such that the terms contemplate payment of costs in addition to the settlement sum, or the settlement sum is reduced on account of the creditor's costs.

- Matthew McCarthy is a Managing Associate and Glyn Ayres is a Lawyer in the Corporate Insolvency and Restructuring practice group of Allens in Melbourne.

Response 2

The key principle in the consideration by a liquidator of any proofs is that the debt must arise before the day on which the winding up of the company is made. Further, for there to be a debt owed by the company there needs to be a contractual liability by the company for the debt.

In the present case, the creditor has spent money on its own lawyers to defend a preference recovery action commenced by the liquidator. There is clearly a debt owed by the company to its lawyers for the legal advice and representation. Whether the incurring of these legal costs by the creditor is also a debt enforceable against the company will be dependent on the contractual arrangements between the creditor and the company entered into pre-liquidation.

The creditor is going to have multiple problems in persuading the liquidator to admit the proof of debt for the $10,000 costs, for the following reasons:

The contractual arrangements between the creditor and the company, being the terms of the hire agreement, relate only to costs and expenses incurred in recovering a debt under the hire agreement. There is nothing in the contract to cover legal costs incurred in the defence of a preference recovery action by a liquidator;

The legal costs have all been incurred after the date of the winding up and therefore offend the basic principle that proofs must relate to pre-liquidation debts;

When the creditor decided to compromise the liquidator's claim for the amount of $7,000, if it wanted to seek costs, then it should have sought to include a separate term in the settlement agreement for payment of costs.

When faced with a weak claim for recovery of a preference, creditors will not be able to recover their costs unless they can broker an agreement with the liquidator to pay costs. Most liquidators will be very unwilling to do this unless there is obvious evidence in the hands of the creditor to show that the liquidator's claim will fail. In this example, if the creditor remained adamant to recover costs, it really had little choice but to run the proceedings. If the creditor had won, costs would have been awarded and made recoverable against the liquidator.

- Sam Pearlman, Partner, Curwoods Lawyers

FOOTNOTES

1 Corporations Act 2001 (Cth) s 553.

2 See Re Pasminco Limited [2002] FCA 231; (2002) 20 ACLC, [32]-[41]; Expile Pty Ltd v Jabb's Excavations Pty Ltd [2004] NSWSC 284; (2004) 22 ACLC 667, [25].

Preference Claim Action Timing

Question

We have received a letter of demand for alleged preference payments of approximately $200K from a small regional legal firm and dated 3rd October 2014. This follows demands by the Liquidator in September 2012. We attempted to discuss this matter with the law firm in the weeks after receiving their letter of demand. On Thursday 11th December 2014 we again discussed it with the law firm and offered to settle the matter for $2K. They advised they would consider our $2K settlement offer but had to file their action against us the following day as their opportunity was about to expire and the chances of acceptance of our offer were remote.

The Liquidators were appointed Administrators on 15th December 2011 and I understand there is a 3 year period in which to take action on a preference claim. When does the clock start ticking and what is the minimum action which must be taken within the time constraints e.g. issue of demand, filing of paperwork, service of paperwork etc?

- National Credit Manager Sydney MICM CCE

Response

Unfortunately for creditors (often trade suppliers), a liquidator has 3 long years from the relation-back day to make an application to Court to recover a preferential payment.

The reality of the insolvency profession is that liquidators are often heavily burdened, so the less dynamic or less pressing files may be left inactive until slower times or when deadlines are looming.

For this reason alone creditors should not assume that because a questionable transaction was dealt with, on a preliminary basis, and not pursued by a liquidator at first instance, the claim will not be revisited. Unfortunately, creditors cannot feel assured that, with each day ticking over, it is less likely that the transaction will be pursued.

When is the last opportunity, for a liquidator to pursue a voidable transaction and what do they have to do?

In short, liquidators will have 3 years from the relation-back day to take action to pursue a voidable transaction.

The relation-back day is the day that the winding up of the company is taken to have begun. A company can be wound up in different ways, as set out in Division 1A of Part 5.6. Most commonly the relation-back day will be the day on which either an order is made that the company be wound up and a liquidator appointed, or the day on which the company resolves by special resolution that it be wound up voluntarily. Where the company was under administration prior to being wound up, the relation-back day may be deemed to be that earlier date on which the administration began. As a general rule of thumb for creditors, the relation-back day will be the day the liquidator was appointed.

If the liquidator wishes to pursue a voidable transaction, the minimum action he or she must take is to ***file an application with the Court*** *before the expiration of 3 years from the relation-back day. The normal rules as to service will apply to*

the application and accordingly service may take place some time later (e.g. under the Federal Court [Corporations] Rules 2000, the time for service must be as soon as practicable after filing and at least 5 days before the hearing) or (e.g. under the Uniform Civil Procedure Rules 2005 (NSW), the time for service must be as soon as practicable after filing).

As a side note; liquidators are able to extend the period of time to make that application to the Court for orders under section 588FF, however this application for an extension of time must be filed within the 3 year time period.

Despite the fact that liquidators have 3 long years to investigate and pursue a preference, creditors should be proactive in addressing any demand they may receive during that period for the repayment of a preference. Silence on these issues is not golden. If the liquidator returns at the 11th hour and files an application with the Court for an order that the transaction is voidable and the money is to be repaid the liquidator may also seek an order for the payment of interest. In the ordinary case the Court will allow interest to run from the date a demand for the recovery of the preference was made; Ferrier and Knight (As Liquidators of Compass Airlines Pty Ltd) v Civil Aviation Authority [1994] FCA 1571; Kazar (Liquidator) v Kargarian; In the Matter of Frontier Architects Pty Ltd (In Liq) [2011] FCAFC 136.

This part of the law (Division 1A of Part 5.6) is not easy. If you are concerned that an application to the Court was not filed on time, you should seek legal advice. In some circumstances a liquidator may have a limited time to pursue a voidable transaction, such as when the company was under administration or a DOCA for a lengthy period of time and then the DOCA failed and the company was liquidated.

- Rebecca Ross and Geoff McDonald, Windeyer Chambers

Rebecca Ross, Solicitor, Gavin Parsons

Geoff McDonald, Barrister at Law

Electronic Service of Originating Process

Question

Can a Statement of Claim be served electronically and if so on what basis ie must it be attached or can it be in a link?

My case in point is I have received an email from a paralegal at a NSW law firm who are acting for a Liquidator who is claiming we received a preferential payment. The email says:

From: Para Legal [mailto:plegal@j&dlaw.com.au]
Sent: Thursday, 18 December 2014 1:50 PM
To: Hard Done By Creditor Pty Ltd
Subject: In the matter of Not So Good Customer Pty Ltd (in liquidation), NSD1234/12

Dear Sir
Johnno and Davo in their capacities as joint and several liquidators of Not So Good Customer Pty Ltd (in liquidation) v Poor Hard Done By Creditor Pty Ltd
Federal Court of Australia, New South Wales registry, proceeding no. NSD1234/12

*We **attach** by way of service:*
Originating Process filed 11 December 2014;
Affidavit of Johnno sworn 28 November 2014;
Exhibit J-1;
Statement of Claim filed 11 December 2014; and
Genuine Steps Statement filed 11 December 2014,

contained in the following dropbox link:
https://www.dropbox.com/sh/mwgg3j2mlaw94r3/AABpFugJl

Please let us know if you have any difficulty accessing the documents.

As you will see, the proceedings have been listed for first directions at 9:30am on Wednesday, 11 February 2015.

Would you please confirm you accept service of attached documents by return email.

Please contact us if you wish to discuss this matter further.

Regards
Para Legal
Senior Paralegal
***T** (02) 1234 5678*
j&dlaw.com.au

Interestingly enough 5 minutes later we received the following email:

-----Original Message-----
From: Para Legal [mailto:plegal@j&dlaw.com.au]
Sent: Thursday, 18 December 2014 1:55 PM
To: Hard Done By Creditor
Subject: Recall: In the matter of Not So Good Customer Pty Ltd (in liquidation), NSD1234/12

Para Legal would like to recall the message, "In the matter of Not So Good Customer Pty Ltd (in liquidation), NSD1234/12".

If the original email was effective service was this effective cancellation of that service?

The second issue on this matter is that the Insolvency Firm of Johnno & Davo were appointed Administrators 15th December 2011 and Liquidators 1st February 2012. I understand they have 3 years in which to instigate action for a preferential payment. When does the clock start ticking? What must they