



Publication: Lawyers Weekly
Date: 4 December 2009
Page No: 16
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Publisher: Reed International Books Australia Pty Ltd

Practice Profile: Insolvency lawyers prove to be GFC's guardian angels

The role of insolvency lawyers in tasks such as reconstruction, asset tracing and financial recovery can set a business back on its feet or lead it through a more orderly and painless demise, as has been seen throughout the tumult of the global financial crisis.

In the background of all the news bulletins about Australia's economic strife and the series of spectacular corporate collapses are lawyers involved in restructuring and insolvency - a growth area since the global financial crisis.

Lawyers in the sector are engaged in a spectrum of activity: chasing down the assets of companies that have gone bust; helping these companies find a way through their troubles; and negotiating arrangements which will keep all parties satisfied.

Lawyers work closely with accountants and other professionals in the often long journey from financial difficulty to administration and then to either recovery or collapse.

A tangled web of corporate woes

A restructuring and insolvency practice entails continuing activity of various types, often lasting years, with many twists and turns and stings in the tail, each step of which may have wider legal ramifications.

Holding Redlich partner Penelope Pengilley, with 20 years' experience in commercial litigation at both trial and appellate levels, says "some issues have very long tails, often taking years, until the matters finally get to court" and often an initial court judgment is not necessarily the end of the matter.

"This is because of issues like getting funding, court and creditor approvals, and then the need to conduct lengthy investigations," she says.

About three-quarters of Pengilley's work involves guiding clients through an often tangled web ranging from corporate reconstruction, to asset tracing and recovery, to voluntary administration, and to liquidation or receivership.

On asset tracing and recovery, Pengilley notes that the tools available to lawyers are now more sophisticated than in the 1990s.

"Today's computer forensics can retrieve data which now more effectively provides the money trail," she says.

"This compares with the situation 15 to 20 years ago when hard-copy documentation went missing far more easily."

Pengilley followed the money on two of Australia's most high-profile corporate disasters of the past decade: Ansett and Opes Prime. She was part of the team which acted for the administrators and later won back \$4 million for Ansett shareholders following the airline's collapse in 2001; and she acted for a private investor, Beconwood Securities, in a case against the ANZ Bank arising out of sharebroker Opes Prime going bust in March last year.

The Beconwood matter is an example of an initial judgment not being the finale, with Pengilley describing it as a "test case to resolve a complex issue and to what extent clients could get money from ANZ".

At the time, Pengilley called the judgment in the Federal Court in May last year just the "first stage" in its ruling that the ANZ had the right to sell hundreds of millions of dollars worth of shares in the collapsed Opes Prime, including a parcel worth \$7 million held by Beconwood.

Ultimately the Beconwood matter was adjourned on the first day of the trial to enable an offer of settlement to be put to the creditors of Opes Prime. This offer led to the Scheme of Company Arrangement now in place.

Pengilley won a partial victory when the court ruled that Beconwood wasn't liable for costs, which would have to be paid by the Opes group's uncharged assets because Beconwood's claim was a test case that needed to be resolved, regardless of who had instigated it.

Timing is everything, according to Pengilley, who warns that "if companies are waiting longer to pull the pin, they are more likely to be completely cleaned out of their assets, leaving creditors and employees stranded".

Avoiding protracted court disputes

Timing is also everything for Thomson Playford Cutlers partner Michael O'Donnell, who emphasises that early involvement by lawyers and other skilled practitioners is often critical to the survival, recovery or salvaging of a business.

O'Donnell, with 18 years' experience in recovery actions and insolvency disputes, regularly defends or prosecutes the claims of liquidators and trustees in bankruptcy, and he has conducted court actions as counsel in various jurisdictions including the High Court, but among his goals is to prevent matters getting that far.

"One of my aims is to assist companies and financiers generate favourable business outcomes without necessarily being drawn or locked into protracted court disputes," he says.

His range of clients includes banks and other financial institutions, insolvency practitioners, receivers and managers, fund managers, insurance companies, superannuation funds, sharebrokers, financial planners, large corporate borrowers, accounting firms, secured and unsecured creditors, directors and officers of struggling companies, large private companies and listed corporations.

O'Donnell's work in the post-GFC era has been a mix, ranging from "bread and butter" administration to the restructuring of companies to help them avoid collapse.

For O'Donnell, asset tracing and recovery have not been a significant component of his work over the past 18 months, mainly because of seeing fewer large frauds which would drive such actions.

He cites fewer instances of cases where "significant assets were either double-financed or went missing". Of cases such as ABC Learning he comments that its downfall was a result of "people believing their own blue-sky predictions without being aware of the bare essentials".

O'Donnell - based in the highly competitive Adelaide market and whose clients include governments, banks and financiers and whose tasks have included the recovery of securities and loans - believes Australia is on the cusp of a more stable financial landscape amid greater regulation and a desire by most banks to clean up their image.

"There have been small increases in bankruptcy work, but not the tidal wave we'd been expecting after the GFC hit," he says.

"At the same time we need to be cautious amid reports that the GFC is now over, because the potential remains for knock-on effects."

"There are no alarm bells in any quarter of our caseload, and there seems to be a healthy head of steam ahead for most businesses."

Also aware of a lack of alarm bells is TressCox partner Nigel Watson, who works mainly for insolvency accountants servicing the small-to-medium enterprise sector.

"I've been advising administrators on the sale of business assets, and have been drafting deeds of company arrangement," he says.

"I've been surprised there haven't been more insolvencies in the SME area but low interest rates, the government stimulus and tax relief are providing breathing space to companies which otherwise would have been in difficulties."

Some companies within sectors such as retail may soon be feeling the pinch as the government bonus is now spent and interest-rate pressures emerge, Watson warns.

Taxman eases the pain

One significant sidelight, which is affecting all facets of restructuring and insolvency work, is what the three lawyers describe as an unusual leniency by the Australian Taxation Office towards the obligations of troubled entities.

"Anecdotally, I have heard that the ATO often backs off and allows companies to work through their difficulties," says Pengilley.

"Sometimes this may work, but sometimes it means that at the end of the day even less will be left." O'Donnell sees the ATO's temporary hands-off role as an important factor, putting "not too much pressure at this point" on vulnerable companies and acting as "a gentle creditor in the marketplace".

"If, or when, that policy approach hardens, the ATO may find unusual levels of uncollectable government revenue and respond with a heavy hand," he says. "That might give rise to increased issues, perhaps next year."

Watson also describes the ATO as "backing off" from its usual zeal to send out directors' penalty notices, observing that the taxman started to grant moratoriums when the GFC struck and withdrew even further in February this year when the Victorian bushfires not only claimed lives but also affected the economy.

Regardless of which direction in which the economy travels, restructuring and insolvency experts are on hand to sort things out.