



Update

Insolvency

November 2010

Court outlines concerns of potential conflict of interest for lawyers acting for administrators

Two separate Court decisions handed down on 26 October 2010 give some food for thought for insolvency practitioners.

Appointment conditional on administrator not engaging law firms on a secured creditor's panel

In a Federal Court decision, Justice Finkelstein agreed to replace the administrators of the Willmott Forest Group of companies on the condition that the new administrators did not engage a law firm who was on a panel of solicitors for a secured creditor.

Justice Finkelstein said that the Court was very aware of the potential for conflict of interests when a law firm, that acts for a secured creditor in any capacity, also advises an administrator on a collapse, where that secured creditor has sustained losses.

Justice Finkelstein made the comments when granting an application brought by the Commonwealth Bank of Australia, St George Bank, a group of Willmott's growers/investors and the ASIC to replace the group's Board appointed administrator.

To ensure the process of investigating and advising on potential creditor claims was as independent as possible, His Honour appointed the new administrators, but only after they undertook not to, except with the leave of the court, retain or appoint as their solicitors any firm which is on the panel of solicitors for either the Commonwealth Bank of Australia or the St George Bank.

Interestingly, Finklestein J also decided to exercise the Court's power to Order that the administrators' remuneration would be determined by the Court, rather than by the creditors at a meeting of creditors.

Liquidator held personally responsible to pay a defendant's indemnity legal costs

In another case, a liquidator has been ordered to personally pay the successful defendant's legal costs on an indemnity basis.

In the Supreme Court of New South Wales decision in *Arena Management Pty Ltd (Administrator Appointed) (Receivers & Managers Appointed) & Anor v Campbell Street Theatre Pty Ltd (No.2)* [2010] NSWSC 1230, Justice Palmer found that the liquidator did not act prudently and reasonably in commencing and prosecuting unsuccessful proceedings against the defendant.

Justice Palmer said that the test for whether a liquidator acted properly and responsibly in bringing and prosecuting proceedings, was whether a prudent liquidator, with the benefit of commercial common sense and experience and with the benefit of competent legal advice, could reasonably have concluded that the proceedings had a sufficient prospect of success to justify spending a considerable amount of the creditors' money on his own legal costs, not to mention the risk an adverse costs order if the case failed. Justice Palmer also said that a case with "sufficient prospect" is not simply mean a case that is "fairly arguable" to resist a summary dismissal application, because a liquidator, like a trustee, is dealing with other people's money and must therefore look at the ultimate likely result of the proceedings.

His Honour found that the liquidator of Area Management Pty Ltd did not act prudently and reasonably in commencing and prosecuting the proceedings because:

1. non-pleaded allegations of fraud (which were also unsupported) were advanced during cross-examination of the defendant;
2. the liquidator failed at several points to tender evidence which could have obviously improved his case;
3. the liquidator did not support his case as to Arena's insolvency (an issue central to the liquidator's claims) in the way the Court would reasonably expect, such as with a comprehensive analysis of Arena's financial position;
4. the liquidator brought a totally unsupported claim of improper use of funds to trade while insolvent; and
5. another claim brought by the liquidator failed because His Honour was unable to determine what it meant.



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