



BUSINESS ADVISORS & INSOLVENCY SPECIALISTS

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Admissibility of Farm Debt Mediation proceedings

In *Hurworth Nominees Pty Limited v ANZ Banking Group Limited* the New South Wales Supreme Court was asked to consider the operation of the *Farm Debt Mediation Act*.

After a lender served notice of intention to take enforcement action, the borrower requested mediation in accordance with the framework set out in the Act. The mediation led to the execution of a deed which was intended to record the terms of a workout agreement.

However the planned workout was unsuccessful, and shortly afterwards a receiver and manager was appointed. The borrower commenced legal action arguing that the deed should be rectified to include terms which, it claimed, both parties had intended would be included.

The bank and the receiver claimed that the rectification application should be dismissed because it relied on evidence of what occurred at the mediation – and section 15 of the legislation provided that evidence about the proceedings of such mediation was inadmissible.

The Supreme Court held that:

- Section 7 of the Act provided that ‘nothing in the Act’ was intended to affect the equitable doctrine of rectification – which appeared to create a direct inconsistency with section 15.

If there was an inconsistency, then the rules of statutory interpretation meant that section 7 would prevail, and the evidence *would* be admissible.

- Even if that interpretation was wrong, the rectification proceedings arguably fell within a specific list of exemptions.

- The exemptions were broadly worded. However, to conclude that the conflict was outside the exemptions would allow a creditor to rely upon section 15 to defeat the Act’s purpose – and that would hardly be the intention of the legislature.
- For those reasons, section 15 should be read down to allow the admissibility of evidence about the proceedings at the mediation.

The borrower was allowed to continue the action.

Winding up application

In *ASIC v Forestview Nominees Pty Ltd (No 3)* the Federal Court dealt with a winding up application brought by ASIC against a company that was previously a part of the Westpoint group.

The company had executed guarantees and indemnities in favour of a number of mezzanine finance companies within the Westpoint group, which secured borrowings by other companies within the Group. The liquidators of the Mezzanine finance companies had demands against the company which exceed \$207m.

ASIC’s application relied upon a presumption of insolvency flowing from the appointment of receivers and managers.

The company directors argued that the company was solvent. They also disputed the validity of the appointment of the receivers, and claimed that the appointment was not indicative of the company’s inability to pay its debts when they became due and payable.

The directors also argued that the inter-group guarantees were uncommercial transactions and insolvent transactions, and therefore were voidable transactions under section 588FE of the Act.

The Court held that:

- The director's claim that the mortgagee had actually consented to the transaction which, it had since relied upon as a default justifying the appointment of receivers, was "inherently improbable."
- The Court should not rely upon the directors opinion about the value of the company's assets.
- The director's oral evidence about the solvency of the company did not 'rise above the level of argument and contention' which - without evidentiary support - did not replace the presumption of insolvency.

The Court ordered the winding up of the company.

Forged loan documents

When a private mortgagor commenced enforcement action to take possession of a mortgaged property, the borrower began legal proceedings to have two loan contracts set aside.

The borrower argued that in substance he was a guarantor and not a borrower. He explained that the money had been invested in a business that was part-owned by a friend, and that his intention was always to be nothing more than guarantor to the friend's loan for a six months period.

He claimed that he was misled over the terms of the first contract and that the second loan contract - an extension of the first - was a forgery. The friend who received the benefit of the funds - now a bankrupt - confirmed that that he was a party to the forgery of the second loan agreement.

The borrower also argued that the loan was not actually provided by the nominated mortgagees, because they had not provided any funds to the mortgage management company at the time that the loan was made.

In *Russo v Buck & Ors* the Supreme Court of South Australia held that:

- The borrower had failed to pay any proper attention to the documents he signed, and to what he was doing, and to correspondence sent to him.
- Although the borrower 'probably saw himself as a guarantor' he must have realised that he was being treated as the borrower, and entered into the transaction on that basis.

- The borrower must have been aware that the initial six-month term had been extended and was 'content' to let the term of the loan continue, on the assumption that his friend would 'fix things up ultimately'
- For that reason, the claim that the borrower was not bound because he never intended to enter into a contract of loan failed on the facts.
- The mortgagee was entitled to claim repayment under the loan contract, even if the moneys advanced came from another source at the time they were paid to the borrower.
- The borrower's signature on the two documents evidencing the second advance was forged, notwithstanding evidence from a handwriting expert that they were genuine.
- Conceptually a forgery might be the subject of ratification, but it would be necessary to show that the borrower knew that his signature had been forged, and there was no evidence of this.

The borrower was successful in having the forged second loan agreement set aside, but liable to pay the debts arising under the first agreement.

Replacement of suspended liquidator by another person from the same firm

In *re Dean-Willcocks, in the matter of Militto's Transport Pty Limited (In Liquidation)* the Federal Court was asked to prospectively authorise the replacement of a liquidator by a person from the same firm.

The vacancy was caused by the resignation of a liquidator whose registration had been suspended.

The Court held that:

- It had the power to make a prospective order in anticipation of a pending resignation.
- The Court was concerned that the 'suspension of a liquidator may not achieve very much if the firm of which he is a member continues in practice, to do the work.'
- However, the proposed replacement would ensure that the previous liquidator would be easily accessible to the new liquidator and ensure a smooth transition of the work and minimise costs that might arise due to the change. In addition the proposed replacement

had his own professional responsibilities and was subject to all of the discipline which is potentially applicable in the circumstances.

In the circumstances the Court was prepared to make the orders sought.

Is a fish hatchery a ‘farm’?

When a lender commenced enforcement action against a borrower, the borrower claimed to be a farmer and argued that the *Farm Debt Mediation Act* required compulsory mediation before the lender could attempt to take possession.

At first hearing the New South Wales Supreme Court held that the business was not a ‘farming business,’ as defined by the Act, so compulsory mediation was not required. The borrower then appealed.

In *Craigie & Anor v Champion Mortgage Services Pty Ltd* the New South Wales Court of Appeal held that:

- The legislation applied to land on which a farmer engaged in a ‘farming operation.’ ‘Farming operation’ was defined to include ‘farming (including dairy farming, poultry farming and bee farming), pastoral, horticultural or grazing operations.’
- The property was a commercial fish hatchery used to breed fish in concrete and earth bottom ponds, for sale to pet shops and aquariums.
- A fish hatchery operation conducted for the purpose of supplying fish for pet shops and aquariums was not a ‘farming operation’ as defined by the Act.

The borrower’s attempt to invoke compulsory mediation was unsuccessful.

Possible imprisonment for bankrupt’s former spouse

A bankruptcy trustee commenced legal action against the former spouse of a bankrupt, claiming an entitlement to a property in Queensland and the proceeds of sale of a health business. Pending final resolution of the claim, the trustee obtained orders from the Federal Court to prevent the former spouse from dealing with those assets.

The trustee learnt that the former spouse breached the orders through the private sale of the Queensland property, and successfully obtained further orders requiring the former spouse to account for the sale proceeds and pay the balance into a trust account. However, the former spouse did not comply.

In *re Pattison, in the matter of Bell v Bell*, the Federal Court of Australia addressed the repeated contempt of Court, and held that:

- Although the ‘substantial’ difference between the advertised price and sale price of the Queensland property ‘were such as to give rise to a suspicion that the sale may have involved some hidden payment of money’ there was insufficient evidence for the Court to conclude that such a payment was made.
- The former spouse’s behaviour amounted to ‘deliberate blindness’ to the terms of the order.
- The contempt in the case was ‘serious,’ and involved a significant sum of money. The former spouse had ‘preferred her own interests, and even her own whims,’ to her duty to comply with the injunction, with the result that the trustee’s litigation would probably be ‘largely fruitless.’
- There were mitigating factors – but they were not as ‘significant’ as the former spouse argued.

Taking all the factors into account, the Court allowed the former spouse a final opportunity to purge the contempt by making good the ‘missing funds’ by paying \$73,987 into Court.

If she was not able to arrange payment within 21 days the trustee would be entitled to summary judgement, and the former spouse would then have a period of six months in which to pay a fine of \$20,000. Each unpaid \$500 at the end of the six month period would effectively convert into a day’s imprisonment – with the former spouse therefore facing up to 40 day’s imprisonment.

Service to a post office box

In *Polstar Pty Ltd v Agnew* the New South Supreme Court was asked to set aside a statutory demand sent to a post office box.

The recipient of the statutory demand argued that the demand was defective because it had not been properly served. Even if it had been properly served, the debtor claimed, it should be set aside.

The creditor argued that any challenge to the demand should be disregarded because the debtor had failed to make the application within 21 days of service.

The Supreme Court held that:

- Both the *Corporations Act* and the *Acts Interpretation Act* provided for service by post to the registered office of a company.
- Although a post office box could not be a registered office, dispatch to a post office box might in substance amount to dispatch to a registered office – for example where the letterhead requested that all correspondence be addressed to the nominated post office box – but that was not the case here.
- However, there had been ‘informal service’ on the plaintiff company, because the document actually reached the sole director of the plaintiff who responded to it on the basis that it had been duly served.
- The date of the informal service was the date that the demand had been collected from the post office box – which meant that the application to set aside the demand had in fact been made within 21 days of service.
- There was a genuine dispute over the amount of the debt, and the creditor was clearly aware of the dispute.
- In the circumstances the issue of a statutory demand was an abuse of process, and it was appropriate to set the demand aside.

Costs of responding to ASIC enquiries

Australian Securities & Investments Commission v Piggott Wood & Baker concerned a liquidator’s remuneration for time spent responding to ASIC enquiries.

As the liquidation in question was the winding up of an unregistered managed investment scheme conducted by a legal firm, the *Tasmanian Legal Profession Act* provided for payment of the liquidator’s remuneration by the Tasmanian Solicitors Guarantee Fund.

The winding up order required the District Registrar to review the liquidator’s remuneration and costs prior to obtaining payment.

The Liquidator had submitted monthly bills to the District Registrar, each of which had been confirmed. The trustee of the Fund had not paid the full amount of those accounts however, deducting \$85,639.65 related to the liquidator’s fees and expenses in responding to enquiries from ASIC. The liquidator then asked the Court to make directions requiring payment of the deducted funds.

The Federal Court held that:

- The trustee had raised concerns about the reasonableness of the liquidator’s fees with ASIC, which had prompted ASIC to seek information from the liquidator and suggest that he act to ‘repair’ communications with the trustee.
- ASIC had accepted that the work had been done by the Liquidator and charged at the appropriate rate. ASIC did not allege or suspect any improper conduct on the part of the Liquidator, or criticise the District Registrar. ASIC’s argument against the order sought by the liquidator was the appointment order did not provide for remuneration for dealing with ASIC.
- The court order had specifically imposed an express obligation to keep ASIC informed so that it could monitor the interests of investors, and the liquidator ‘would surely have been open to criticism if he had refused.’
- The decision in *ASIC v Atlantic 3 Financial (Aust) Pty Ltd* – in which the Queensland Supreme Court disallowed a part of an investigating accountants’ claim for remuneration in relation to time spent meeting with ASIC – should be distinguished from the present case.

This was because reporting to ASIC was a specific requirement under the winding up order.

The liquidator was successful in obtaining an order for the payment of his remuneration and costs in dealing with ASIC.

Recent Decision!

In *Pattison v Schiffer* a bankruptcy trustee sought a judgement order confirming a former bankrupt's income contribution liability of \$96,961.74.

The *Bankruptcy Act* allows a trustee to estimate a reasonable level of remuneration if the bankrupt is not employed by an arm's length employer.

In this case, the former bankrupt argued that the trustee had formed an estimate 'arbitrarily, or capriciously or in bad faith.' He claimed that he was employed as a fitter and turner at a wage of \$200 per week. The trustee argued that he had no alternative but to make an estimate, due to the bankrupt's non-cooperation.

The Federal Magistrates Court determined that:

- The conduct of the former bankrupt during his bankruptcy 'was obstructionist, uncooperative, misleading and deceptive,' which included his failure to provide information about his income and his failure to disclose 'significant assets.'
- The trustee's decision to disregard the information provided by the former bankrupt was 'totally justified.'
- The trustee had 'erred on the side of caution' and his comparison to an advertised 'Chief Engineering Executive' position was appropriate notwithstanding the former bankrupt's lack of formal engineering qualifications.
- It was reasonable for the trustee to make a yearly CPI adjustment to the base remuneration once it was determined, and also appropriate to use the figure of tax actually paid by the bankrupt in the calculations rather than the tax notionally payable.

The Court found in favour of the trustee on all points.

Important note

The information contained in this newsletter is by way of general comment only and is not intended as a substitute for specific advice that addresses your particular circumstances. You should seek specific advice before acting.

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