CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES
Volume 10, Issue 2, April 2016

This matter concerned a lease of turbines by GE to Forge Group, following which Forge Group was placed into voluntary administration. The Administrators noted that at the time of their appointment, GE had not registered its security interest in the turbines on the PPSR and accordingly, considered that their appointment resulted with title in the turbines vesting in the company pursuant to section 267 of the PPSA, commonly known as the "vesting rule", i.e. GE's security interest was unperfected.

In response, GE contended that the PPSA did not apply to the turbines as these turbines were fixtures for the purposes of the section 8 of the PPSA, which states that fixtures to land are not subject to the operation of the PPSA.

The court looked at section 10 of PPSA which defines fixtures as goods that are affixed to land. The definition of "affixed to land" embraced the common law concepts, which emphasises on the intention of persons who put the goods in place as well as the degree and objective of annexations. The court held that the turbines were designed to be demobilised and could be moved without causing damage to the land; the turbines were therefore not fixtures within the meaning of the PPSA.

GE also argued that it was not regularly engaged in the business of leasing goods for the purposes of s13(2) (a) of the Act, which states that a PPS lease ***does not*** include a lease by a lessor who is not regularly engaged in the business of leasing goods. Therefore the turbines should not be considered as a PPS lease and accordingly, did not fall within the ambit of the PPSA.

The Court rejected this argument and held that section 13(2) (a) of the Act applies as at the time when the lease was entered into. In this case, the lease was executed in March 2013. Further, "regularly engaged" looks at the conduct of a company ***as a whole***, both in Australia and Overseas, when the relevant interest of the lessor arises. In this regard, in March 2013 when the lease was executed. The court found that leasing goods was a proper component of GE's business worldwide and locally at this time.

This case reinforces the paramount importance of registering security interests pursuant to the PPSA and highlights that failure to do so will be no excuse for a party which finds itself on the wrong side of the operation of the PPSA.

Condon Update

By Lyn Dong

Following on from the success of the 2015 Condon Forum, the first 2016 Condon Forum was held at our office on Wednesday 16 March. The topic for the afternoon was "Will the Bankruptcy Reform improve innovation?"

We were delighted to have Stephen Mullette (Principal of MatthewsFolbigg), Bob Cruickshanks (Senior Manager at Condon Associates Group) and Schon Condon (Managing Principal of Condon Associates Group) present to the audience as we discussed the Bankruptcy Reforms. James McPherson, Director of Insolvency Services was the MC for the afternoon.

Here are some Kodak Moments…

James posed for pictures with our speakers Bob, Stephen and Schon (L to R) after another successful Condon Forum.

ON THE BEAM

Why Are We Really Here?

By Schon G Condon RFD

I remember a long time ago, in the last century, that we were promised that with the improvements of technology and computers life would be made significantly easier. Well we certainly seem to have gotten that one wrong. In reality it often seems that computers have only, in reality, allowed us to over complicate even the most simple of things.

So what has prompted this little gem? In a recent decision in the New South Wales Supreme Court, the issues surrounding dealing with trusts has again come up and we now have some very new guidance in respect to how trusts and their assets and liabilities are treated. What is most concerning about this is that in essence, to deal with the assets will require significant involvement of lawyers and in fact the Court, with many decisions needing to be made by the Court itself.

In all my dealings with Creditors there is one focal point that they approach, and that is *"when do I get my money back?"*. It is only after they are advised that they are not going to get their money that other issues come in such as "getting even", "getting the directors" or seeking an ability to sue someone else come to the forefront. Therefore, if we truly focus on what Creditors REALLY want, then we should be seeking to make the process as simple and cost effective as possible. Requiring commercial and operational decisions to be made by a Court simply seems to be a logger heads with the Creditors desired endstate.

Many years ago, when it was necessary that certain aspects of a matter were dealt with by a Court, such as remuneration when you couldn't get a quorum at a Meeting of Creditors, the liquidator would prepare an affidavit in the prescribed (by the Court) form, swear it and arrangements would be made for an appropriate member of the liquidator's staff to meet with a Registrar, and if all was appropriate an Order approving the fees was made. Approval was by no means automatic and I can assure you the employee never went unprepared, it was singularly embarrassing. Today the same process requires the not inexpensive involvement of lawyer and the consumption of valuable Court time.

Given that a Trust, on its own, is incapable of doing things, hence the need of a Trustee, then it is the Trustee that incurs the Creditors on behalf of the Trust, in doing so, the Trustee creates an asset for itself in the right to claim against the assets held (by the trustee) in the Trust for compensation. Thus in the simplest view the liabilities are the liability of the Trustee and thus fall within the constraints of either the Bankruptcy Act or the Corporations Law, depending upon the nature of the Trustee.

Inside this issue:

I acknowledge that there can be complications where, as occasionally happens someone seeks to leave the Trustee with the liabilities, but remove the Trust and its assets from the Trustees control, or where the Trustee was either operating on its own as well, or was the Trustee of multiple trusts. Certainly in such cases judicial involvement may not just be necessary, but in fact critical to the expedient resolution of the matter. That is the action is taken to reduce costs and protect assets, not create costs.

These days it is far too easy to lose sight of what the true endstate should be. Regrettably, as many can focus on nothing more than making money, then the endstate can get diverted into being the journey.

Nothing gives me greater professional pleasure than advising people that they will get all of their money back, or if not, then at least giving them more back than they expected. As I am often told this is a very rare occurrence in our industry.

Leadership is about making things simple, and getting them done. Stupidity is complicating things to the point that only you understand what is going on.

Level 6, 87 Marsden Street, Parramatta, NSW 2150
PO Box 1418 Parramatta, NSW 2124
Email: enquiries@condon.com.au
Phone: **1300 939 129**
Sydney CBD | Bankstown | Liverpool | Wollongong | Newcastle

Protection to Administrators Acting in the Best Interest of Creditors

By Hiteshi Dekhtawala

In a recent Supreme Court of NSW Decision, *Renex Holdings (Dandenong) 1 Pty Ltd (Administrators Appointed) & Others [2015] NSWSC 2003*, Justice Black once again adopted a very practical and encouraging approach whereby he confirmed that Administrators may be protected from personal liability for post appointment debts.

The background to the Administration was that Renex's Creditors mainly comprised of Secured Creditors and Employees, i.e. there were nominal unsecured creditor claims. One of the Secured Creditors agreed to loan funds to the Administrator to continue trading the business in order to protect its value ahead of a future planned sale on a going concern basis, which ultimately would result in a better return to the Creditors.

In light of the above arrangement, the Administrators sought Orders from the Court that they would not be personally liable for the loan from the Secured Creditor, as this would then enable them to make freehand decisions for a better return to the Creditors.

Justice Black made the Orders sought on the following basis:

1. It would be in the best interest of the Creditors;
2. It was mainly consistent with Part 5.3A of the Act, i.e. it would allow a fresh start to companies with a prospective future;
3. The continued trading of the business would result in continued employment opportunities for the employees of the Company; and
4. This Order would not be disadvantageous for the nominal unsecured claims in this instance.

Whilst a good outcome in this instance, Justice Black's decision might differ in cases especially where there are a large number of unsecured claims in an administration.

Furthermore, it does leave one with some unanswered questions in terms of the security position of the Secured Creditor due to lack of available security during the Administration period. It would also raise questions relating to the "funding" Secured Creditor's priority in respect of other ranking security interests.

Notwithstanding the above, it is the writer's view that with Administrations in circumstances similar to the present case, the above decision will possibly lead to many more successful Administrations and an effective treatment for businesses with prospects which ultimately will mean an effective application of Part 5.3A of the Act.

Insurer's Liability to Third Parties

By Padmini Saheb

The High Court Decision in the case of CGU Insurance Limited v Blakeley & Ors (2016) HCA2 details the circumstances in which a Liquidator as a third party claimant can directly pursue the insurers of insolvent defendants.

In these proceedings, the Liquidators applied to the Court to join CGU as a Defendant and to amend the Statement of Claim to include a declaration that CGU was liable to indemnify the Directors under the policy. The joinder application was made on the basis of the person's relationship with the party to the proceeding. CGU appealed that the Court had no jurisdiction to entertain the claim of Liquidators to a contract between CGU and the former Directors concerning the meaning and effect of the contract.

The Appeal was dismissed based on the Australian Case Law supporting the proposition that in exceptional circumstances a Court will permit a plaintiff who is not a party to a Contract to seek a declaration as to rights existing under the Contract. The Court placed emphasis on the practicality of joining the insurer and resolving the matter in which the plaintiff had a real interest.

CGU was granted special leave to appeal to the High Court on the grounds that the Court lacked jurisdiction to entertain the claim the Liquidators against CGU. The ultimate question arose whether that claim was part of the matter in which the Liquidators claimed against the Directors. The resulting decision was that if the Liquidators made claim against the Directors and establish the liability of CGU to indemnify the insured Directors, the proceeds of the policy becomes payable to the Liquidators as a result of the operation of Section 562 of the Act and Section 117 of the Bankruptcy Act. As such the Liquidators stood to benefit from the outcome given their potential entitlement to the proceeds of the policy and could not be seen as outsiders in these proceedings. This Case opens the door for certain third party claimants to directly pursue the insurers of insolvent and potential insolvent insured defendants.

As a principal, this has broadened application by Appointees in respect of seeking to challenge determinations made by insurers to deny liability under policies of insurance to which the company in liquidation is not a party and where the policy may adapt for the benefit of Creditors.

Insolvency Law Reform Act 2016 – A Carrot and Stick Approach to the Insolvency System

By Jarrad Pope

After more than two years in the making, the Insolvency Law Reform Act ("ILRA") has finally passed into law with a commencement date expected early in 2017. As many of the industry would (or should) be aware, the ILRA comprises the latest series of reforms prompted largely by a perceived lack of integrity and transparency in the Insolvency system. In this regard, the ILRA introduces an increased regulatory regime – particularly directed at corporate Insolvency Practitioners ("IP") and provisions empowering creditors and other relevant stakeholders to take action against IPs suspected of serious misconduct. In line with the Government's recent innovation drive, the ILRA also sees significant reductions of the administrative burden imposed on corporate IPs – particularly in respect of unfunded administrations.

The majority of the new regulations introduced by the ILRA appear to target the smaller, firms that engage in unconscionable conduct such as, acting dishonestly and acting in self-interest to the detriment of creditors and/or their appointed Company. In this regard, ASIC has been granted significant further powers rivalling that of the Inspector-General in Bankruptcy ergo: to issue "show cause" notices when it suspects a breach of the Act on the part of a Liquidator. The intention here appears to be to streamline the process for removing corrupt and otherwise comprised Liquidators from the system.

Interestingly, it appears that many of the proposed changes with the ILRA have been adapted from the ARITA Code of Practice, which represents the self-regulation of the insolvency system. Clearly there is a lack of confidence in the current, largely self-regulated system in Corporate Insolvency, which the government is seeking to replace with the heavy monitoring and regulation current present for Bankruptcy Trustees.

Creditors have also been empowered to act if they are not satisfied with the conduct of an administration. Again, in line with existing Bankruptcy law, IPs are now obliged to:

- Call a meeting should a significant creditor request same;
- Provide information, documents or even reports to creditors, upon request or following a resolution; furthermore
- Creditors can also now appoint another registered Liquidator to examine the conduct of the relevant IP – particularly in regards to their claimed remuneration.

Should creditors be wholly dissatisfied with the conduct of an IP, they will now also able to vote to remove a practitioner by resolution, when previously court proceedings were required (aside from specific initial meetings).

These reforms shift some of the burden of enforcement away from regulators and further empowers creditors to hold IPs to account when they suspect misconduct. Concerns have been raised amongst industry groups regarding the potential misuse of this additional power allocated to creditors, however, based on outcomes in personal insolvency (where these powers have been available for years), it has not resulted in substantial disruption to the system in the majority of cases.

On a happier note, the ILRA has also included several substantive reductions in the administrative burden on IPs, particularly in regards to low-asset administrations. Some of the changes include:

- Removal of mandatory initial and final meetings in voluntary liquidations;
- Allowing resolutions to be passed without a physical meeting;
- Removing the requirement for annual meetings/reports in voluntary liquidations;
- Permitting the publishing of information using electronic media, such as websites;
- Allowing IPs to draw a prescribed minimum amount of remuneration without requiring a meeting of creditors.

IPs will be able to "assign" (sell) their statutory rights to commence proceedings.

The net result of these changes should be to drive down the costs involved in liquidating low or zero-asset companies. The ability of an IP to sell their statutory rights is also an interesting change; although it remains to be seen what parties will be interested in purchasing such rights.

Overall the ILRA is a positive step for the insolvency system which has been subject to criticism of late – largely as a result of a few bad apples spoiling the bunch.

1 Report 430 – ASIC Regulation of registered corporate insolvency practitioners: January to December 2014

Forge's Failure Led to the Delivery of a $50M Windfall

By Sophie Bai

In the recent decision of *Forge Group Power Pty Limited ("Forge Group") (in Liquidation) (Receivers and Managers appointed) v General Electric International Inc [2016] NSWSC 52* (**GE**), the Court's decision provided some useful guidance on the interpretation of what is a PPS lease and when the title in leased goods vests in the event of Insolvency.