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A recent Order by the Supreme Court of New South Wales, *Larkden Pty. Limited v. Lloyd Energy Systems Pty. Limited* reiterates the above decisions. The decision made it clear that the Costs Orders made after the appointment of an Administrator are not provable debts i.e. they are not admissible in an Administration within the meaning of Section 444D (1) of the Corporations Act.

To give a bird's eye view on the said case:-

- *In Larkden Pty. Limited v. Lloyd Energy Systems Pty. Limited* [2011] NSWSC 1567, the Supreme Court of New South Wales was called upon to determine whether a Costs Award made by an Arbitrator after the appointment of an Administrator was provable for the purposes of the Deed of Company Arrangement subsequently executed by the Company.
- The Company submitted that the Costs Claim was provable because, at the time of the appointment, it was a contingent debt (the contingency being whether or not the Arbitrator exercised his discretion to award costs).
- The Court did not accept this argument. It said that a Costs Order made after the appointment date is not a provable debt, because the source of the liability (being the Order) arises for the first time after appointment.

The Court also said the fact that a claim for costs was made before the appointment does not change the matter, and nor does the fact that it was (prior to the appointment date) almost certain that costs would ultimately be awarded.

The recent decision serves as a reminder to all Administrators that post-appointment Costs Orders are generally not provable in any type of External Administration (except in certain circumstances where a Costs Order is made in favour of the petitioning creditor in winding up proceedings). It is noted that such post appointment Costs Orders are not admissible and hence, can be enforced against the Insolvent Entity notwithstanding its insolvency status.

In light of the above, it is very important for the Directors of a Company to get proper advice before placing their Companies into External Administration. The date of Administration becomes vital when the intended course of action is to place the Company into Voluntary Administration and subsequently into a Deed of Company Arrangement. The reason for this is that it would prove to be in the best interest of all Creditors and the Company itself to include all possible Creditors in the Administration and the date of Administration determines whether or not a claim will be awarded as a claim pursuant to Section 444D of the Corporations Act.

Condon Update

It has been a busy but entertaining couple of months! Condon Associates recently hosted the Condon Forum, and the Turkish-Australian Business Networking Luncheon which received rave reviews, and our Social Club Committee organised a Barbeque/Trivia Night as a well-deserved thank you to our staff for all their efforts.

Here are some Kodak moments...

Schon Condon and Hakki Hassan with the guests of honour Mr Emin Akseki, Vice Counsel of the Turkish Consulate and Ecevit Demir.

Winners of the Trivia Game and the Social Club Committee members.

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ON THE BEAM

CONDON
FORENSIC INSOLVENCY TURNAROUND
ASSOCIATES

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Rejoining Ancient Tribes

By Schon G Condon RFD

One of the inherent factors of being involved with the insolvency profession is that you get many opportunities to see how things can be done wrong, and how they can independently go wrong. The advantage of this is certainly knowledge but more importantly it is the ability to impart such knowledge to others in the hope that they do not follow in the same footsteps. Alas it doesn't always work.

Having long been concerned about giving back, and based on my own learning experiences, one of the areas that I have both spoken on and instructed in has been Business Planning. It is a fascinating area and I have seen the simple and the complex, the fancy and the plain, and the practical and the ridiculous. Regardless of which construct you use there are three fundamental concepts that you cannot avoid, they are i) where are you now, ii) where do you want to be and iii) what are the steps to take to get you from your starting point to your destination.

Interestingly these three points are essentially the same for all forms of planning be it merely a trip for whatever reason, a game plan for a sport or even the Fire Planning for a battle.

So, why the sudden interest in planning you say? Over the past couple of weeks in a combination of a couple of economic presentations, articles in the papers and listening to our erstwhile politicians it has become clear that there are some significant view differences between some of the parties. The most extreme is exemplified by the view of the Prime Minister that we must talk up Australia's strong economy so that everyone understands, whereas Clifford Bennett who gave the Economic Update at the recent CPA Public Practice Conference actually stated that if you were to take mining out of the Australian economy then the economy has probably been in recession for some considerable time.

Whilst the extremities have varied the inconsistencies have essentially appeared to remain the same, and it was with this thought that my mind wandered to the plight of an ancient, noble but now extinct tribe known as the *Fa-carwees*.

The *Fa-carwee Tribe* were truly reminiscent of humans of that period in that they were short of stature, communal and lived on the plains amongst the tall grasses. It was unfortunately this combination that ultimately lead to the tribe's demise. They would spend much of their time leaping up and down or climbing on each other's shoulders yelling out in an endeavour let everyone else know both who they were and to determine exactly where they were.

Often unsuccessful in clearly establishing the reality of where they were, they would pretend or presume or even assume that they were in a particular position that was perceived to be to their benefit. Unfortunately this would generally lead them to head in the wrong direction, set up camp where it was unsafe or generally just falling foul of the real environment in which they existed. Ultimately the tribe simply died out altogether as the environment overtook them.

Due to this untimely extinction there has been little recorded of the Fa-carwee's history. Notwithstanding this they did leave human kind with some wonderfully accurate and fundamentally basic observations;-

- *'if you don't really know where you are you are lost',*
- *'if you don't know where you are going, but do, you are likely to make the situation worse', and*
- *'if you don't know where you are going how will you ever know that you have actually arrived.'*

So how does this relate to modern day business? The decisions that businesses, governments and central banks make are all based on the perceived situation and the experience of history as to what is considered to be the right

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- Residential Builder Fails-Protection via Home Warranty Insurance Scheme
- Admissibility of Cost Orders in External Administrations

remedy to direct the organisation, country or economy to a position better than its present locale.

To demonstrate it graphically the real fear is that if we think we are going forward and we put our foot on the accelerator when we are actually going backwards it is highly likely that we will end up over the cliff earlier and with a greater impact than needed.

It really is a time to focus on and accept reality and then identify and deliver solutions that will actually get us to where we want to go. Pretending to be somewhere, at either extreme, will most likely prove fatal.

Unfortunately I suspect it's time to make sure that you have plenty of contingency, alas it's the only real cure for a bad plan!!!!!

Enjoy the read.

ATO Pays the Price for Undelivered Mail!

By Brandon Lee

The Federal Court of Australia has recently highlighted, in the matter of *Deputy Commissioner of Taxation v Manta's on the Beach Pty Ltd [2012] FCA 417*[1], the risks run by the Australian Taxation Office ("ATO") who served a statutory demand on the Company by post in the hope of winding them up. The result was that the Winding Up Application was dismissed.

It has been a long standing practice for a body serving high-volume statutory demands like the ATO to use the post as a medium to communicate their aforementioned demands to Companies for cost efficiency purposes. Although the ATO in this case seems to have the upper hand as they could have referred to the various provisions which permit service by post and which provide for presumptions as to when documents sent by post are taken to have been served and ultimately wind up the Company in question. However as discussed in the table below, the Federal Court took into consideration the arguments put forward by Mrs Batterby, the sole Director of the Company and the ATO, while referring to the key authorities in another recent case of the *Deputy Commissioner of Taxation, in the matter of ABW Design & Construction Pty Ltd v ABW Design and Construction Pty Ltd [2012] FCA 346.*

ATO's Arguments
• The statutory demand with its supporting affidavit was sent by prepaid post in an envelope which bore the address of the defendant's registered office. • The ATO gave evidence of a system maintained by the ATO for the recording of any correspondence, including statutory demands sent by post, which end up returned undelivered or otherwise returned to sender. • There was no record within that system of this statutory demand and supporting affidavit having been returned undelivered or otherwise returned to sender.
Company Director's Arguments
• The Director gave evidence that she lived at the same address as the registered address of the Company and stated unequivocally that she did not receive any correspondence by mail from the ATO enclosing a statutory demand. • The Director gave evidence that she rarely collected the mail herself and that her then husband would collect it from the mail box and leave any of her mail or Company related mail on her desk or in the dining room. • The Director also stated that her practice was not to dispose of mail without first opening it and checking its contents. • Mr Battersby confirmed her evidence as to the above practices.

Based on the arguments put forward in the above table, the Federal Court acknowledged that the element of self-interest "attends at least Mrs Battersby's evidence" but however noted that it is not present in Mr Batterby's; and therefore accepted her evidence. The Court was satisfied by the finding that the statutory demand and affidavit was not received at all at the Company's registered office and that Mrs Batterby first became aware of it in an email from the ATO in March 2012.

Moving forward, the Court also found that when the application for winding up was filed by the ATO, there had been no non-compliance by the Company with the statutory demand. The Court went on to consider whether, in the absence of the presumption of insolvency afforded by non-compliance with a statutory demand, the ATO had satisfied the onus of proving the Company was insolvent. The Court held that the ATO had not and therefore the Winding Up Application was dismissed, with costs.

In conclusion, this case illustrates that where service of a statutory demand is affected by post, the Creditor bears the onus of proving its receipt on a "balance of probability" as they have no other choice but to rely only on statutory presumptions as to receipt. The case should act as a reminder to all Creditors serving statutory demands that it might be wise to consider using a well-defined and organized method of serving to avoid incurring unnecessary costs and wasting their resources by attending to the lengthy litigation process that might follow!

Footnote: Directors should ensure that their compliance accountants have lodged appropriate forms reflecting any changes of registered addresses for their corporate entities and their own residential circumstance with regulatory authorities such as the Australian Securities and Investments Commission and the Australian Taxation Office.

Residential Builder Fails- Protection via Home Warranty Insurance Scheme

By Leonard Khoury

Over the past month, we have witnessed several major construction entities enter into some form of External Administration by the appointment of either Receivers and Managers or Voluntary Administrators, or in extreme cases, Liquidators. These appointments have resulted in the temporary halt to multi-million dollar projects, including the $2 billion redevelopment of Sydney Central Park, thereby impacting on the financial viability of a number of sub-contractors involved in these projects and a variety of other interested stakeholders.

Consumer Protection in the Construction and Building Development industry is of extreme importance. It is not only those stakeholders directly involved with these multi-million dollar projects who become affected by the failure of an entity undertaking such projects. On a smaller scale, Private Property Owners seeking to invest it in newly developed residential projects are also affected by the failure of construction entities. Consumer Protection regimes, including the Home Warranty Insurance Scheme, were introduced in each State to protect Private Property Owners and Stakeholders in general from the impact of such failures of construction entities.

In NSW, the Home Warranty Insurance Scheme, established under the Home Building Act 1989 is a protection scheme for all Home Owners undertaking new development building projects. The purpose of this scheme is to protect Home Owners from any private builders or construction entities failing to honour their commitments under properly executed building contracts as a result of insolvency, disappearance or death. Insurance coverage is required to be provided by the builder or any tradesperson before receiving any deposit or funding from the Home Owner. The Scheme is regulated by the New South Wales State Government; however it is administered through a certified private insurer and allows for funding to be provided directly to the Home Owner(s) for completion and settlement of same.

A contract for the development of a residential project by a Home Owner should not be executed without any evidence of Home Warranty Insurance coverage being purchased by the individual or Builder undertaking the works. In the event that the Builder is a company that is insolvent and enters into a form of External Administration, various complex legal and practical issues will emerge for both the Insolvency Practitioner and the Home Owner to resolve. The Home Owner is left with an incomplete home, a failed Builder and the anguish and stress of finding alternative means to finalise the project.

Fortunately, the Home Warranty Insurance Scheme protects the Home Owner from the failure of such a Company. It allows the Property Owner to claim any damages and losses on the project, and seek to appoint an alternate builder to finalise their project.

In order for Home Owners to stabilise their position in regard to the Home Warranty Insurance Scheme they should, as soon as they are made aware of their Builder's financial circumstances, contact their insurers and complete and lodge the prescribed insurance claim forms.

It is essential that all persons entering into the building of a residential project safeguard their interests in the projected by ensuring that they have accessed the protection mechanisms that are available.

Admissibility of Cost Orders in External Administrations

By Hiteshi Dekhtawala

As we are all aware, Costs Orders made in an Insolvency situation rank a priority in External Administrations, including individual Bankruptcies. However, for an External Administrator/Trustee in Bankruptcy and the Parties involved, it is very important to consider the date when the Cost Order was made as this determines the admissibility of the Claim in the Administration.

I believe most of us would be familiar with the leading cases in this respect:-

- *Foots v. Southern Cross Mine Management Pty. Limited* [2007] HCA 56 which states that, in bankruptcy, Costs Orders made after the relevant date are not provable;
- *Haagmans v. Australian Bight Infrastructure Pty. Limited* [2010] SASC 337 which states that the Foots case means that Costs Orders made after the commencement of a winding up are also not provable. Haagmans also decided that such claims are not provable under a Deed of Company Arrangement.