

## BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

### ISSUE 10: AUTUMN 2009

#### **INSOLVENCY – Deeds of Company Arrangement - Creditors Trusts: *Parkview Constructions Pty Ltd v Tayeh & Ors* [2009] NSWSC 186**

A creditors' trust is a deed of company arrangement ("DOCA") under which, typically:

- A trust is formed, with creditors as beneficiaries;
- The company and/or third parties promise to make payments or transfer property to the trustee for the benefit of creditors;
- In return the creditors' rights against the company are extinguished;
- The DOCA normally terminates immediately upon creation of the trust, whereupon the company ceases to be externally administered.

In contrast, the more traditional form of DOCA does not terminate until the obligations of the company and/or third party funders have been met.

In *Parkview Constructions*, a creditors' trust was challenged as being unfair. The challenge failed. First, an order terminating the DOCA under s 445D(1) of the Corporations Act would be of no utility, as the DOCA had already terminated upon the creation of the trust. Second, an order under s 447A could not be made because it was not sought in the originating process. Third, even if an order could be made under s 447A, such order could not abolish or neutralize rights and obligations that had already been created under the trust deed and related instruments. Fourth, no other power was available to undo what had been done.

Barrett J expressed disquiet that the creditors trust is an unregulated form of administration. His Honour also said that an administrator recommending a creditors' trust bears a heavy burden of explaining its implications to creditors.

**By Edmund Finnane**

#### **TRUSTS – Disclosure of trust documents to beneficiaries of a discretionary trust: *Breakspear v Ackland* [2009] Ch 32**

In *Breakspear*, the de facto settlor of a discretionary family trust wrote a confidential non-binding 'wish letter' to the trustees of the trust outlining matters he wished the trustees to take into account when exercising their discretionary powers. The beneficiaries of the trust sought disclosure of the 'wish letter' which the trustees refused.

Justice Briggs, ordering disclosure of the 'wish letter', held that the issue was one to be determined by the exercise of a judicial discretion. The decision offers an extensive analysis of all the Commonwealth authorities on point, including the New South Wales Court of Appeal decision in *Hartigan Nominees Pty Ltd v Rydge* (1992) NSWLR 405.

**By Benjamin Kasep**

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**PRACTICE AND PROCEDURE – implied undertaking in respect of documents disclosed in litigation: *Hearne v Street* [2008] HCA 36; (2008) 235 CLR 125:**

In circumstances where a party to litigation, for the purposes of that litigation, discloses its relevant documents to other parties, those parties and their servants or agents will be bound by an “implied undertaking” to the court in which the proceedings are pending not to disclose those documents or their contents to strangers to that litigation unless and until those documents become evidence during the hearing of those proceedings.

The “implied undertaking” is now more accurately described as a substantive rule of law than as an undertaking.

To breach the obligation, without foreknowledge of that undertaking, *constitutes* a civil contempt of court.

To breach the obligation, with foreknowledge of that undertaking, constitutes a criminal contempt of court.

**By John Graves, SC**

**A COMMENT ON HEARNE v STREET**

A party can be relieved from the implied undertaking discussed in the above note, in special circumstances. The relevant principles have been set out in several recent cases, many of which were discussed in the decision of Johnson J in *Prime Finance Pty Ltd v Randall* [2009] NSWSC 361.

**By Edmund Finnane**

**PRACTICE AND PROCEDURE – The discovery of ‘masked’ documents and extracts: *Areva Nc (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd (No 2)* [2009] WASC 67; *Egglishaw v ACC (No 2)* (2009) 253 ALR 354**

Two recent decisions have considered the longstanding practice, not expressly covered by the court rules, of discovering ‘masked’ documents or extracts of documents so as to exclude irrelevant material.

The decision of Chief Justice Martin in *Areva Nc (Australia) Pty Ltd* contains an excellent survey of the practice (that diverges considerably) in every state of Australia. Meanwhile, Besanko J in *Egglishaw* gave careful consideration to the practice in the Federal Court of Australia and, interestingly, drew a distinction between ‘general’ discovery and ‘limited’ discovery—the practice of

‘masking’ being available in the former class of cases but not the latter.

Glossed over in *Areva Nc (Australia) Pty Ltd* and *Egglishaw*, the decision of McPherson J *Curlex Manufacturing Pty Ltd v Carlingford* [1987] 2 Qd R 335 offers an excellent history of the practice.

**By Benjamin Kasep**

**INSOLVENCY UPDATE – Statutory Demands**

As of 1 January 2009, all statutory demands are required to have an additional warning box.

<p><b>A failure to respond to a statutory demand can have very serious consequences for a company. In particular, it may result in the company being placed in liquidation and control of the company passing to the liquidator of the company.</b></p>
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The amendment to the form was introduced by Corporations Amendment Regulation 2007 (No 13). This warning box is required in all demands after 31 December 2008 (reg 4(2)).

Given that the warning box is an important part of a debtor’s rights, there is a very real chance that failure to set out the new warning box could cause substantial injustice and lead to the demand being set aside.

There has also been a recent change to the Registrar’s powers to deal with applications that sometimes arise in an insolvency context:

- Registrars now have the power to wind up corporations under the just and equitable ground (s.461(1)(k)).
- Registrars’ powers to reinstate a deregistered company under s.601AH(2) are now limited to circumstances where the application is not opposed by ASIC.
- the limitations currently applied in equity proceedings to registrars exercising powers under rules 31.19 and 31.20 (expert evidence) have been removed.

**By Christopher Wood**

**ANNOUNCEMENTS**

**New Member**

Thirteen Wentworth Selborne is pleased to announce that **Ramena Kako** will join the floor shortly as a member.

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