SHERIDANS
CHARTERED ACCOUNTANTS

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Creating better futures

Sheridans' View

20TH ANNIVERSARY

Receivers: Who reaps the profits?

A recent decision of the Queensland Supreme Court definitively confirmed that when a receiver purchases inventory in a trade-on of a business, and subsequently makes a profit on the sale of that inventory, the profit is available to a secured creditor who has a floating charge (known since the introduction of the PPSA as a circulating security interest) over the inventory *(CMI Industrial Pty Ltd (Receivers and Managers Appointed) (In Liquidation) [2015] QSC 96).*

The other possible contender for a receiver's trading profits is priority creditors (such as employees).

With regard to property that is the subject of a circulating security interest, Sections 433 and 561 of the Corporations Act 2001 (Cth) require a receiver to pay certain amounts to priority creditors from that property that comes into their hands, in priority to any claims by secured creditors. Inventory is usually subject to a secured creditor's circulating security interest.

However, this recent case confirmed that such priority creditors are only entitled to be paid from property that is the subject of a circulating security interest which was available as at the date of the receiver's appointment.

The decision is of assistance to receivers who are often confronted with claims by priority employees from assets 'coming into their hands'.

The decision is very favourable for secured lenders with a floating charge or circulating security interest who may reap the benefits of a receiver's profitable trading activities. Secured creditors can take comfort that cash advances they make to enable a receiver to purchase inventory to facilitate a trade-on of the business will not be eroded by the claims of priority creditors.

Set-off affirmations

A recurring issue in liquidations is whether a person (usually, but not always, a director) can off-set a claim by a liquidator for insolvent trading, or an unfair preference, against monies owed to that person by the insolvent company.

Section 553C of the Corporations Act 2001 (Cth) contains the set-off provisions. The leading decision on the operation of Section 553C in the context of insolvent trading is *Re ACN 007 537 000 Pty Ltd (in Liq); Ex parte Parker (1997) 150 ALR 92*, where it was held that an insolvent trading claim could be set-off against a debt owed by the insolvent company, despite the fact the insolvent trading claim did not arise from any "dealings" between the parties.

Smith v Boné, in the matter of ACN 002 864 002 Pty Ltd (in Liq) [2015] FCA 319, involving a liquidator's claim against a director (Mr Boné) for insolvent trading, confirmed that prima facie set-off was available against debts due to the director from the company.

Morton & Anor v Rexel Electrical Supplies Pty Ltd [2015] QDC 49 found that set-off was available for a creditor of an insolvent company facing a claim by the company's liquidator for an unfair preference claim.

However, importantly, both cases also reaffirmed the position that such set-off is not available against an insolvent trading claim or an unfair preference claim if the person seeking to rely on the set-off had notice of the fact that the company was insolvent at the time the liability from the company to them was created.

FOREWORD

"Sometimes, success comes not from what you learn to do but what you learn to stop doing."
Sandja Brügmann

"You can always find a distraction if you're looking for one."
Tom Kite

"Your results are the product of either personal focus or personal distractions. The choice is yours."
John Di Lemme

"No fear. No distractions. The ability to let that which does not matter truly slide."
Chuck Palahniuk (Fight Club)

"If I had a dollar for every time I got distracted, I wish I had a puppy."
Jennifer Low

SHERIDANS
Level 9, 40 St. George's Terrace,
Perth WA 6000
PO Box Z5209
Perth WA 6831

T: (08) 9221 9339
F: (08) 9221 9340
E: general@sheridansac.com.au

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Latest AFSA video

AFSA has released the third in a series of personal insolvency videos.

The latest video "Consequences of Bankruptcy" outlines some of the serious consequences of bankruptcy.

You can view the videos on AFSA's YouTube channel: click on the YouTube icon on the AFSA website homepage (www.afsa.gov.au).

Frequently Asked Questions

(i) What is a Director Penalty Notice ("DPN")?

A method by which the ATO can impose personal liability on company directors for PAYG withholding and SGC debts without the delay or expense of taking legal action.

For further information, ask us for a copy of our Fact Sheet on DPNs.

(ii) What is a composition?

A composition or arrangement is an offer made by a bankrupt through their bankruptcy trustee to finalise their debts.

A report is prepared by the trustee and creditors vote on whether or not to accept the offer. If the creditors, by special resolution, accept the proposal, the bankruptcy is annulled.

Recent Assignments

- **Administration or liquidation of:**
  - A scaffolding company.
  - A commercial cleaning franchisee.
  - The main contractor for a community housing development.
  - A corporate uniforms manufacturer.
- **Personal insolvency administrations, including those involved with:**
  - A supermarket and import business.
  - A coffee shop.
- **Informal insolvency advice to various businesses, including those involved in hospitality, retail, construction trades and labour hire.**
- **Litigation support, including:**
  - Valuation of a small group of companies involved in meat retail and wholesale distribution, and meat exportation.
  - Valuation of an earthworks business.
  - Investigations and sundry advice regarding various Family Court matters.
  - Assistance with the quantification of the parties' asset pool in Family Court matters.

> "Experience is something you don't get until just after you need it."
>
> Steven Wright

EDITORIAL

Driven to Distraction?

How often are you distracted at work?

No matter who you are or where you work, it is likely that you will be distracted at work innumerable times, every day.

Regaining concentration after a distraction takes time, so distractions reduce productivity and effectiveness, and increase stress. Distractions can erode your ability to focus and may lead to factual mistakes and poor judgement, all leading to poor performance.

The result of distractions is often a persistent feeling of being rushed, an inability to sustain attention, and a tendency to hop from task to task, idea to idea.

Frequent distractions can negatively affect your mood as an inability to get good quality work done on time makes you feel frustrated and unhappy with your work.

What are the common distractions we face at work?

- emails
- disorganisation
- instant messaging
- phone calls
- internet
- other people
- work environment
- other projects and tasks
- tiredness

The key to managing distractions is being aware of what your major distractions are; take the time to learn or notice what distracts you, then find strategies to reduce those distractions. There is a wealth of possible strategies and you may need to try several strategies to find ones that work for you.

Distractions can rarely be eliminated but they can be reduced with successful management.

The occasional workplace distraction can sometimes be a good thing, offering a moment to 'step back' from work and avoid burn out, work overload or fatigue. There is a problem, however, when distractions take up too much of our time and prevent us from getting our work done.

For those interested in further reading, I recommend *"Driven to Distraction at Work: How to focus and be more productive"* by Edward Hallowell (Harvard Business Review Press).

DID YOU KNOW?

When the American Steve Jenks was deployed in Iraq, his mum sent letters that always said: *"No matter how lonely you feel... look at the moon and know I am with you. I love you to the moon and back."*

Now she is set to be the first lunar burial for Elysium Space, a company that sends cremated remains to the moon.

CONTACTS

Jennifer Low
Principal B.Sc., FCA.
Official & Registered Liquidator.
Bankruptcy Trustee

Helen Joyce
Director
MComm
Bankruptcy Trustee

Phil Davie
Senior Accountant
BA (Hons)

Shannon O'Connor
Senior Accountant
B.Com, BA (ComSt), CA