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Chartered Accountants

Insolvency & Turnaround Management News Update July 2010

This update covers some recent decisions that may be of interest to you dealing with directors duties including the consequences of not fulfilling these duties as prescribed by the Companies Act 1993.

Directors Duties

A long ongoing case ***Lewis v Mason and Meltzer*** as liquidators of Global Print Strategies, was finally determined in the Supreme Court.

The Lewis' were essentially ordered to contribute to the creditors losses in the liquidated company due to the fact that they were the named directors of the company. They had not exhibited sufficient levels of control over the business to know its full financial position. They did not have day to day control but relied on a manager. This however did not excuse their liability under the Companies Act. They were ordered to contribute to the losses of the company personally.

Further, in relation to directors duties and consequences of failed trading entities The National Enforcement Unit ("NEU") who deal with prohibition orders under section 385 of the Companies Act, have recently advised the way they will deal with referrals in relation to director prohibitions. Previously, a full investigation report to the Registrar of Companies was completed whether there were one or more failures. It has been acknowledged that there is no onus to prepare a detailed report for directors involved in the failure of two or more businesses within a five year period. A complaint can be made to the National Enforcement Unit. The onus is on the director to satisfy the Registrar of Companies (who issues the notice) as to why a director of previously failed companies should not be banned from any involvement as a director or a management role in any other companies. This can be for a period of up to five years.

271 Pooling Arrangements

Another interesting recent decision was where the liquidators (Shepherd Dunphy) of Carm Holdings applied for a pooling order under section 271 of the Companies Act to run a series of liquidations together. This would enable the creditors of a series of companies to be pooled and essentially run as one liquidation with any assets realised being applied to a creditors pool for all creditors. In this particular case there were 21 companies listed and it was argued successfully that each liquidation would not be administered separately such was the intermingling of payments, assets and creditors.

While this would be at the higher end, in respect of the number of companies involved, it is timely to remind directors that even if they have two or three companies trading at the same time, these entities must be run separately with their own financial and accounting records kept. If there is a confusion from the creditors as to the entity they are dealing with and use of assets and/or bank accounts between entities, there is the ability to seek an order for the pooling of the companies drawing all assets from both or several companies, into the common pool for distribution to the creditors of all entities as per the seventh schedule of the Companies Act 1993, which includes the preferential payments as described in that schedule. This would require an application to the Court by the liquidators, which is not frequently done, however, it is a tool available, and has the potential to leave the assets of all entities at risk.

Statutory Demands and Consequences of Issuing These Along with the Costs in any Legal Dispute.

A recent case has been decided through the courts, ***Landmark Technologies v Telecom***, a statutory demand was issued against Telecom for funds allegedly due. It would appear the process of serving the statutory demand was used regardless of the fact the other party were aware of a substantial dispute as to monies owed.

This required Telecom to apply to have the demand set aside consuming further funds and court costs. Telecom was successful in receiving an award for costs due to the extra expense involved in court proceedings. They had applied for increased costs on the basis the demand should not have been issued as there was a substantial dispute. In this case there was no award made, but this is a possibility if a statutory demand is issued inappropriately. The courts have made it clear that the issuing of a statutory demand is not to be used as a debt collection tool where there is knowledge of a substantial dispute.

This publication is necessarily brief and general in nature, and you should seek specific professional advice before taking any action in relation to the matters dealt with. RHB Chartered Accountants Limited, its employees and agents do not accept any liability for actions taken in reliance on this publication.

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CIR v Grant – Voluntary Administration

This is a case recently decided in relation to the Voluntary Administration regime. More specifically it related to the adoption of the Deed of Company Arrangement ("DOCA") at the watershed meeting.

In this instance there were competing interests between unsecured non preferential debts and a debt due to the CIR that was predominantly preferential.

In this instance there was a majority in number voting for the adoption of the DOCA. However, the votes cast did not reach the required 75% threshold in value, as the IRD voted against the adoption; they held approximately 30% in value of the total debt.

For a Deed of Company Arrangement to be adopted there must be a majority in number of creditors representing at least 75% in value of the debts.

The chairman used his casting vote in this instance to adopt the proposal.

The matter was then referred to the court and it was held that it was inappropriate to use his casting vote in this instance. It was ruled that it is only appropriate to use a casting vote when there is an equal number voting both for and against.

Another point that was brought home was the DOCA did not specifically deal with the ranking of the Inland Revenue's preferential debt and whether they would achieve a priority status as would be afforded to them if the company was in liquidation. Because this was not contemplated in the DOCA it was held that this would be both oppressive and unfairly prejudicial to the CIR. The DOCA was overturned. Therefore any DOCA drawn up or contemplated should consider any preferential debts owed and factor in how they should be dealt with.

Okawa Bay Resort

One RHB partner is currently a director of Apton Investments Limited which owns four floating weeks in the Okawa Bay Resort timeshare facility on the shores of Lake Rotoiti.

The resort in recent years has been upgraded and is now managed by the Duxton Hotel chain. Here is a quote from the website: www.okawabaytimeshare.co.nz

"Your condominium is your holiday home for the time you own, and whether you have 1 person or the maximum of 6 people to sleep is up to you, with no per head charges at all. Each of the 15 units is 1012 sq. ft., has upstairs a queen master bedroom and twin bedroom with 2 roll outs, and one bathroom, and downstairs a large dining and lounge area with great lake views, a full kitchen , and a smaller bathroom, all in an attractive and timeless colonial style of architecture . Everything is provided except for food and drinks. There is a full supply of linen, crockery, and kitchen equipment for 6 people. Washing machine, dryer, dishwasher, microwave and Sky TV plus DVD player are in each condominium, and there is parking for 2 cars behind. All units have lovely lake views, over expansive lawns and gardens- truly relaxing! Just bring your food and clothes, plus maybe a good book and a fishing rod!"

Anyone interest in purchasing a week should contact Brenda on 07 571 6280 for details

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