

Legal Update

12 August 2010

Not insolvent - guess again?

On occasions a perfectly solvent company can be placed into liquidation. Usually this happens because a director, or someone associated with a company, has failed to notice a statutory demand or a wind up application which has come to the registered address of the company.

Under Section 482 of the *Corporations Act* a company can be resurrected but it is an expensive exercise as it means not only paying the legal costs of the application to the Courts and the liquidator's fees but all current liabilities of the company. The Courts will only reinstate a company if it is solvent.

Sometimes the creditor who has put the company into liquidation has a claim against the company which would otherwise be disputed. Nevertheless, in order to get the company back, the company's resources have to be applied to pay out the disputed debt and then, if the company wishes to, the company has to chase the recovery of that debt.

However, in *SNL Group Pty Limited (in Liquidation) (SNL)*, a case we ran earlier this month, Bergin CJ in Equity was asked both to reinstate SNL **and** not to force it to pay the asserted debt allegedly owed to the petitioning creditor (**CMA**).

SNL's directors engaged BRI Ferrier to prepare a comprehensive report showing the company was solvent. After reviewing that report and after a conversion of shareholder's loans to equity, Her Honour had no difficulty in concluding that SNL was solvent.

On the petitioning creditor's claim, CMA asserted that it was owed a not inconsiderable sum in respect of a consignment of iron ore shipped to Singapore in 2008. SNL, on the other hand, asserted that the grade of iron ore within the shipment was well below that which was required in the contract (there are in fact proceedings on foot in Singapore to deal with that issue).

It was our application that, pending the outcome of those Singapore proceedings, the funds claimed by CMA be paid into Court here.

CMA is a publicly listed entity. There are a number of reports at ASX going to CMA's financial position. Her Honour was convinced there were both serious issues to be tried in relation to the dispute between SNL and CMA and that on the current information as to CMA's financial position it was better for the monies to be paid into Court.

The outcome means that our clients have their company back and whilst they had to make significant outlays they stand a very good chance of avoiding

having to pay CMA any money at all if they are successful in the Singapore proceedings. It is an unusual decision but, given the facts, we think Her Honour exercised her discretion properly.

A further point of interest, is that Her Honour used Section 471A to perfect the company's reinstatement. Generally, director's powers are suspended when a company goes into liquidation. Practically that means that, if there are "housekeeping issues" necessary to be completed by directors and the passing of resolutions to convert debt to equity, the Courts make conditional orders. Section 471A, however, allows the Court to invest directors of companies in liquidation with the power to undertake tasks so that the order to reinstate is not conditional and is only made once the directors have complied with the Court's direction. Until now, the section has been rarely used; that will now change.

[Please click here for a link to the decision.](#)

Please contact Peter Harkin, Sam Ingui or Tina Douglas if you have any questions or would like to discuss any aspect of this case.

Peter Harkin
Partner

T: 02 8281 4501
E: pjh@cbp.com.au

[>>> return to first page](#)

T 61 2 8281 4555
F 61 2 8281 4567
E law@cbp.com.au
I www.cbp.com.au

Level 42, 2 Park Street
Sydney NSW 2000
Australia

DX 280 Sydney
Advoc Asia member

Colin Biggers
& Paisley

LAWYERS