

## Antecedent Transactions for Corporate Liquidation

### Step 1: What is the commencement date and RBD?

For court ordered winding up under ss 233, 459A, 459B, 461, winding up is taken to have begun or commenced:

- Winding up order is made (s 513A(e))
- If VA precedes winding up order, then CD is commencement of VA (s 513A(b), s 513C(b))
- If voluntary winding up was already in progress, then CD would be the day voluntary winding up began (s 513A(a))

For voluntary winding up resolved by special resolution, winding up is taken to have begun or commenced:

- on the day resolution passed (s 513B(e))

### Relation back day [determine claw back period]

- if CD is winding up order, RBD is the application was filed (s 91, Item 14)
- if VA precedes winding up order, then RBD is commencement of VA (RBD and CD is the same) (s 91, Item 1)
  - o Rationale: once company goes into VA – any dealings with company is void (s 437D)

### Time periods for insolvent transactions

NB: Extends to period ending on RBD, as well as to period after the RBD and ending on the day winding up began

- Insolvent transaction (unfair preference/uncommercial transaction) → 6 months ending on RBD + CD (s 588FE(2))
- Insolvent transaction (uncommercial transaction only) → 2 years (s 588FE(3))
- Insolvent transaction (unfair preferences or uncommercial transaction with related party) → 4 years ending on RBD (s 588FE(4))
- Insolvent transaction (unfair preference or uncommercial transaction to defeat creditors) → 10 years ending on RBD (s 588FE(5))
- Unfair loan → limitless + CD (s 588FE(6))
- Unreasonable director related transaction → 4 years + CD (s 588FE(6A))

NB: Any transactions after the CD is void (s 468)

### Step 2: Was the company insolvent and if so when?

s 95A(1): A person is solvent if and only if the person is able to pay all debts as and when they become due and payable

s 95A(2): A person who is not solvent is insolvent.

### General considerations:

- Cash flow test not a balance sheet test
- Debts are a fixed liquidated sum owing and due and payable by one person to another. Note that prospective debts and contingent debts are included (*New Cap; Hawkins v Bank of China*). Are liabilities to pay unliquidated claims debts for the purposes of s 95A?
  - o In *Bank of Australasia*, the HCA took into account the debtor's liability to pay unliquidated damages in concluding that the debtor was unable to pay his debts as and when they fell due for payment. The relevant liability to pay unliquidated damages was for breach of warranty and fraudulent misrepresentation pursuant to a judgment that was made

shortly after the debt in question was incurred. In *Box Valley*, the NSWCA found that a potential (but highly probable) future liability to pay unliquidated damages under a futures contract could not be taken into account in determining whether a company was insolvent at an earlier point in time under s95A. It was held that such a liability was not a 'debt' for the purposes of s95A. However, *New Cap* was distinguished from *Box Valley* as insurance liabilities arose under reinsurance contracts and were to be discharged by performance of those contracts; as distinct from liabilities which arose on breach of those contracts like in *Box Valley*. Consequently, *insurance liabilities (unliquidated claims) were debts for relevant purposes.*

- These matters are tested retrospectively (*Lewis v Doran*)

*Relevant indicators for insolvency* [NOT DISPOSITIVE]

- (i) Continuing losses, (ii) Liquidity ratios below 1, (iii) overdue taxes, (iv) liability to borrow further funds or to raise further capital (*Standard Chartered Bank v Antico*), (v) bank requests to reduce overdrafts, (vi) changing supply terms, (vii) failure to pay within trading terms, (viii) special arrangements with selected creditors, (ix) enforcement action taken by creditors.

*Countervailing indicators for insolvency*

- (i) readily realisable assets (*Brookes v Heritage Hotel Adelaide*)
- (ii) temporary lack of liquidity rather than endemic shortage of working capital particularly where the company's liquidity can be restored by successful outcome of business ventures (*Rees v Bank of NSW*)
- (iii) support from parent company is relevant but need more than mere statements of potential support
- (iv) borrowed funds

*Creditor delays: concept of due debt and insolvency*

Delays in chasing up repayment or taking up enforcement action which is due and payable are not relevant to insolvency assessment unless:

- Debtor can show some *binding agreement* to change trading terms
- Debtor can establish an *estoppel* (*Walton v Maher*)
- Unless debtor can demonstrate a course of dealing (*Southern Cross v DCT*)