## SET-OFFS AND CORPORATE INSOLVENCY

## QUESTIONS AND ANSWERS

**Question - Jim O'Donovan (University of Western Australia):**

Can I take you back to the situation involving a customer who is a trustee and also conducts affairs in its own right in dealings with the bank. I think both of you suggested and both of you agreed that there could be mutuality in this situation even though the customer was a trustee. Can I look at a very simple situation where the bank owes the customer $50,000 and where the customer as trustee owes the bank $50,000 - a fairly neat situation. Why should the beneficiaries of the trust get the benefit or windfall of the trustee's debt owed by the bank to the trustee in its own right at the expense of the trustee's individual or general creditors? Is this accommodated through the trustee's right of indemnity or some other principle of unjust enrichment in the wash-up at the end of the day?

**Response - Rory Derham:**

Well the reason that he should get it is because s.86 of the Bankruptcy Act allows him to have it. Section 86 is mandatory in its operation. If there are mutual credits, mutual debts or mutual dealings there shall be a set off. National Westminster Bank v. Halesowen says you cannot contract out of that - that is mandatory. Provided there is mutuality there is a set off. Now in this situation you may be looked upon as being hard, but I think that would be a question for amending the legislation. It seems to me there is mutuality, both demands are by and between the same parties and in the same right and therefore while it may seem to be a hard result, the legislation specifically allows it.

**Question - Jim O'Donovan (University of Western Australia):**

That is not the law is it? That is what you think the law is deemed to be!

**Response - Rory Derham:**

Well there is one case Nelson and Roberts where an agent incurred a liability on behalf of (it might have been an executor incurring a liability) a deceased estate and there the court said that when you do incur the liability even though you are doing it on behalf of the beneficiary the liability is still you personal liability. While you may have rights of indemnity from other sources, that does not alter the fact that it is your liability.

**Comment - SEK Hulme QC:**

I was just wondering, is it as unfair as it looks? The bank is not getting first go at the trust fund - that indemnity - in front of other people is it? It is getting first go at the man's $50,000 which is in the bank. And if you have the position (I do not know what he is doing going bankrupt with $50,000 in the bank although I suppose you can - you are more ambitious these days!) but if he does go bankrupt, is the bank in any different position from any other creditor who has got a set off, who has got a cross-debt, and it happens to have that money there? It is not as if they were getting first go into the trust fund. That might sound funny but that is not where it is getting the money.

**Question - Kathy Walter (Clayton Utz):**

Can you break the mutuality if you rely on the powers vested in the trustee by the trust deed if he can only incur a trust fee and there is a specific negation of personal liability? Sometimes a trustee in his own capacity acts in a way which is not allowed by the trust deed.

**Response - Rory Derham:**

I think if you say you are contracting as trustee of a trust, that ensures your right of indemnity. But that is between you and the trust. The liability between the trustee and the person with whom he is contracting is still a trustee's liability.

**Question - Kathy Walter (Clayton Utz):**

Even if there are specific indications that the creditors/bank may only have regard to the assets of the trust?

**Response - Rory Derham:**

Doesn't all that do is limit the size of the recovery of the bank? I would have thought that limits the size of the recovery of the bank but the point is it is still the liability of the trustee. The bank may agree that it will have regard to, the source of its recovery maybe from a different source, maybe to an amount up to the trust fund, but their liability is still the liability of the trustee.

**Comment - Professor Robert Baxt (Chairman):**

I think we are going to have to bring it to a close because whilst I think this is a topic that we could speak on for some time (and maybe next year we might have a specific paper dealing with that particular aspect of it), we are already running a bit behind time.

Rory Derham told me that he was very nervous before he gave this paper. He tells me that it was probably the first time that he has given a paper of this kind. I think he has done himself very proud. The paper that he has written is one I am sure that you will benefit from reading when it is published. As SEK Hulme says his book is an outstanding piece of work and the paper I think will add to that. I am sure you would like to join with me in thanking Rory Derham and SEK Hulme whose contribution again was excellent, for their contributions.