CORPORATE INSOLVENCY LAW REFORM

An Autopsy on the Past and an Anatomy of the Future

QUESTIONS AND ANSWERS

Question - Shayne Daley (ANZ Bank, Melbourne):

In respect of the statutory administration procedure I understood you to say where a creditor who secured over the whole or almost all of the assets, I forget the term you used, takes his selection within the 14 day period, that is it. He must make a choice. My question is cannot such a creditor have their cake and eat it too? Can they not establish an information flow with the administrator? Can they not attend as someone who may be an observer to the proceedings and in effect achieve some outcome that is to the satisfaction of all parties. I noticed that Terry Taylor's UK statistics talked about the court approved schemes being quite successful in many cases. I just wondered what your thoughts were upon that.

Response - Ron Harmer (Speaker):

I will not deal with Terry's part of it, but on your initial point and that is whether there can be some type of combination of forces between the fully secured creditor and the administrator, that is certainly possible. But it is also interesting to realise that this procedure gives the fully secured creditor the option if it wants to in fact invoke the administration regime itself. It can as an alternative to enforcing the security in fact put the company under administration. The other observation I think is that in every case where there is a wholly secured creditor it is totally naive of us to contemplate that any person who is approached to become the administrator of that company will not initially go to that creditor, put the cards on the table and say: 'What do you think you are going to do? Can we combine?' and so on and so forth, because it would be sheer folly in many instances for an administrator to even accept an appointment if the reality was that the wholly secured creditor would simply step in and the circumstance of the company were such that once that happened that would bring it to a crashing halt. So I think we have got a lot of practical and pragmatic considerations which will emerge as the procedure starts.

Question - Philippa Colman (Blake Dawson Waldron):

Ron, just as a follow up to the last question, would you give us some practical sorts of examples of situations where a so-called wholly secured creditor would choose administration over enforcement of a security by the first ranking wholly secured creditor.

Response - Ron Harmer (Speaker):

When you talk about the first ranking wholly secured, are you also saying that there are no specific securities ahead of that wholly secured creditor? [Yes] Well then you have taken the carpet out from under my legs because if there were some specific charges which ranked in priority to the wholly secured creditor - and remember wholly secured simply means having a security over the whole or substantially all of the property, it does not mean that you have to be first in the field. But in a case where there were some specific securities ahead of that creditor it may be in the interests of that creditor to

keep the thing together rather than having it fragmented. And we all know that if a wholly secured creditor moves and appoints a receiver and land, for example, is mortgaged to X by way of priority, if we have got retention of title creditors in there etc, all that happens is every person goes after their bit of the action, the thing collapses, fragments, and that is it. So there is one instance where a wholly secured creditor might prefer the administration regime and that is where there is a retention of title supplier in there who has virtually the command of maybe the totality of the stock in trade or whatever it is of the company. Another instance which bears no relationship to so much the enforcement of the security is that a bank may prefer not to be regarded as the ogre that pulls the plug. And time and time again it has been related to me by managers of banks in country towns, in suburban communities and so forth, one of the last things that they often want to do is to appoint a receiver which results in unemployment and so on and so forth. And when you come to think of it, what has the wholly secured creditor got to lose by permitting an administration? Provided that wholly secured creditor has faith in the administrator in the same way that you would have faith in a receiver, where is the down-side in keeping the totality of that company together for a period of 35 days or whatever it might be? That is, I think, the pragmatic side of it that sometimes needs to be addressed.

Question - Pam Gray (Charles Sturt University):

I am absolutely fascinated by the metaphor you were using generally of the medical operation and I think it has great potential. I am addressing my point to Philip Wood and I am asking him whether or not he thinks the following further metaphors might be useful in the development of the law in this area? In working out what sort of treatment the patient should be given, we should act like medical practitioners and work out the state of health of the patient. Is the patient in good health, bad health, what is the strength left of the patient, is the patient diseased, is the patient brain dead? If the management does not offer enough by its vitality, are there any organs worth salvaging or would a transplant work? Can we take out some tissue or put in some tissue? Has the body lost limbs? Are there parasites in there? Are there some takeover cancers? I think that the patient has probably many facets that we need to identify in legal terms in order to determine whether or not the patient should be treated with attractive nurses and good attention or exterminated as quickly as possible. Perhaps you might have some comment on the potential of these metaphors to assist us in developing a better system of legal management.

Response - Philip Wood (Commentator):

I think it is brilliant. I really think it is terrific. All of those are entirely relevant. One of the problems with the insolvency law is it has to deal with many different situations, and of course you cannot, because you have got to have one law which is non-discriminatory. But all of those are highly relevant - I quite agree.

Comment - Pam Gray (Charles Sturt University):

I feel I can make these comments because I happen to be teaching a very extraordinary combination of health law and finance law!

Response - Philip Wood (Commentator):

Could I just comment on what one of the previous speakers raised - when would a floating charge let this procedure go ahead? In fact one of the most visible cases in which this has happened is **Canary Wharf Olympia & York** in the UK, in which I am involved, where the banks had security over everything in sight, but nevertheless they preferred to allow an administrator to go in instead of appointing a receiver. And the reason was that in that way they could take advantage of the freeze against liquidations imposed by the procedure and the freeze against other creditors interfering with it. So they could keep creditors at bay, but nevertheless, in effect, it really is a receivership because, you see, the banks have complete control because if they just turn off the money tap then the administration must come to an end because there is no way the administrator can keep going. So I mean that in a way you might say is using this new rehabilitation procedure for what it was not intended to be used for but it is a good example of actually where it worked in a very unexpected way.