

RECENT DEVELOPMENTS — VOLUNTARY ADMINISTRATIONS

QUESTIONS AND ANSWERS

Question - John Stumbles (Mallesons Stephen Jaques, Sydney):

I have had occasion to look at one of the deeds of company arrangement in one of the Brash companies and what intrigued me was the division of power between the scheme administrator or the deed administrator and the directors. What considerations went into that delineation?

Response - Leon Zwier (Speaker):

It is difficult to perhaps deal with this as a one off. There were different sorts of Brash deeds and different creditors have looked at different of them, not appreciating that there are differences. The two principal deeds are the BPL deed which is Brash Pty Ltd which was formerly owned by Brash Holdings, a wholly owned subsidiary, now owned by On Deng Seng. There is no control by the administrator of the running of BPL. We then have the publicly listed shell Bibery. Bibery has no assets, it has no liabilities, but it is controlled by the administrators absolutely to the exclusion of the directors because we wanted to create a window of opportunity to float Bibery if On Deng Seng through BPL wanted to put the business back that way.

What we did was we tried to leave all of the obligations of the directors in place but have all the powers in Bibery and we hope that that is the way we have done it, and again it has not yet been tested, but in our view the obligations in relation to annual returns and accounts and so on vest with the directors, but the power to make decisions for the company to affix its seal resides with the administrators. It is perfectly possible within the s 444A(4) definition of what goes into the deed.

Question - From the floor (unidentified)

My question is directed to both Michael Humphris and Leon Zwier. I wonder whether, in drafting the deed of company arrangement in Brashes Pty Ltd you had turned your minds to the possibility that Brashes might subsequently be wound up; if so, the date of commencement of the winding up would be deemed to be the date of commencement of the administration. Would this not require special care in protecting the deed creditors? Also, would there not be special care for the protection of post-deed creditors, who may not otherwise rank in the winding up?

Response - Leon Zwier (Speaker):

I wholeheartedly agree with your observations. What I would say though is it depends very much on the formulation of the deed. I can tell you in the draft for the Brash administration deed we turned our minds to that issue and created effectively trust funds. The funds which go to pay the old creditors are funds created by trust arrangements and certain moneys presently being held on trust which will survive a subsequent winding up of the company.

The issue raised is a good issue. I think that there are many more problems that will come out in time, but I think when you draft the deed you have to turn your mind to that very question, about what would happen on the winding up of the company.