



NEWS WITH CLOUT

Offering Corporate & Personal Solvency Solutions

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A RESTRUCTURING TRAP

The Courts have used a wide interpretation of the term “uncommercial transaction” when reviewing transfers of businesses and assets from companies that ultimately end up in liquidation.

To remind you, section 588FB of the *Corporations Act, 2001* (“the Act”) covers the issue of the voiding of uncommercial transactions. It says:-

“A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company’s circumstances would not have entered into the transaction, having regard to:

- (a) the benefits (if any) to the company of entering into the transaction;*
- (b) the detriment to the company of entering into the transaction;*
- (c) the respective benefits to other parties to the transaction of entering into it; and*
- (d) any other relevant matter”*

It is not all that uncommon to see companies in liquidation where the business has been transferred with valuable consideration paid either via taking over certain creditors in the new entity or cash transferred and having those creditors paid out of the old company and not really knowing what has transpired.

We all look at that and say *“the transfer was for fair market value what is uncommercial about that?”*

Where this scenario comes unstuck is the definition of any other relevant matter in relation to section 588FB of the Act.

In Solfire Pty Limited (In Liquidation) (1997) ACLC 1487 the Court found a set of facts

similar to that mentioned above. A comment by the Court with regard to the issue of uncommercial transactions was:

“In my view the whole transaction which commenced on 8 August 1996 and concluded at least as far as the company was concerned on 19 September 1996 was one designed to defeat the rights of its judgement creditors, conceived by the respondents as a method by which the ordinary processes of the law – however expensive they may have been in the circumstances of this case – could be circumvented so that the company having used all its available resources to pay creditors (including the respondents) other than those judgement creditors the moneys that were owing to them, could go into liquidation leaving its judgement creditors with judgements and unsatisfied statutory demands which would be worthless. In my view the whole transaction may properly be characterised as “an uncommercial transaction” within s.588FB of the Corporations Law” It is clear in my view that the whole object of the transaction stretching from 8 August 1996 to 19 September 1996 was to give “an unfair preference” to the company’s creditors (including the respondents) at the expense of its judgement creditors”

With this kind of thing the commerciality of taking the legal action and the value of the assets transferred will be a consideration. You should also be aware that this can also be construed as a breach of director’s fiduciary duty of acting bonafide in the interests of the company, which in an insolvent situation includes the interest of all creditors. If this is the case, directors run the risk of exposing themselves to personal liability.

Clearly transferring is a two edged sword.

As ever we welcome all your enquiries.



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