

News with Clout

Providing Corporate & Personal Solvency Solutions

PROVIDE ADVICE ON THE DARK SIDE AT YOUR PERIL

We are indebted to Andrew McInnes from McInnes Legal in Ballina for bringing a particular Court decision to our attention.

What little of the facts known at present are that Timothy Somerville a North Sydney lawyer has been found guilty under the Corporations Act for aiding and abetting eight clients in breaking the law by the NSW Supreme Court.

This involved the transfer of assets from 15 near insolvent companies, to new entities in consideration for the issuing of V class shares.

Creditors who continued to have ongoing relationships were paid by the new entities but as usual the insurers and the ATO were not paid. Justice Windeyer commented that *"a scheme has been devised to bring about asset stripping but to make this seem legitimate by providing V class shares."*

On a purely intellectual basis it would be interesting to get a more detailed look at the structure as to how they were proposing to circumvent the voidable provisions of the Corporations Act such as uncommercial transactions under Section 588FB.

Counsel for Somerville endeavoured to argue that a lawyer could not be held liable under the Act for giving advice. This seems to be rejected by Justice Windeyer saying *"that depends upon what advice was given"*. The judge also went on to elaborate that the solicitor did all the work to give effect to the restructuring other than to sign the documents.

The size of the big stick that the Supreme Court is to bring to bear on the advisor and whether there is to be an appeal has yet to be determined. But this is well and truly a warning for advisors.

As alluded to above this article leaves a number of unanswered questions. Was it the advice itself or when the advice was given? Alternatively was

it the fact that the professional advisor also did all the work to give effect to his advice. In addition is this a civil remedy which could be available to a liquidator.

To elaborate, is there now a difference between the prudent advice as to the structuring of ventures by entrepreneurs who have an appetite for risk and the advice to move assets when in the shadow of possible events or catastrophes that have already occurred. One is prior to undertaking a venture the other is the old bandaid solution. Are they now regarded as *"aiding and abetting"*. Unlikely one would hope.

In addition decisions like this that focus on the advisor, make us wonder how long is it going to be before there is an action against a professional advisor for not advising a client as to the possible consequences of inappropriate structures or the likely fallout in the event where a client continues to trade insolvently when the advisor had knowledge of that situation and no mention was made to the client as to the consequences. Is there even a check for solvency when sending out the annual declarations to corporate clients?

Taking this a little further, let us not mistake the good news of ongoing tax losses meaning no tax to pay when maybe we should be asking who or what is funding those losses and what it may mean in terms of business or lifestyle if the situation continues. In light of this decision it is not hard to envisage the possibility of the contributory negligence argument being tested. After all better to sue an insurance company for professional negligence than the director of a failed entity if collecting on a judgement were ever to be an issue.

There is no doubt we live in interesting times.

As ever we welcome all your insolvency related enquiries no matter how big or small.