

# CITY INSOLVENCY DISCUSSION GROUP

Wednesday, 3 October 2018

## TOPIC

*Assignment of Causes of Action – The New Regime*

## PRESENTED BY

Dan Butler, Senior Associate – Lavan



# **Assignment of Causes of Action – The New Regime**

Dan Butler  
3 October 2018

# Today

- Introduction of *Schedule 2* of the *Corporations Act 2001* (Cth) (the **Corporations Act**) and *Bankruptcy Act 1966* (the **BA**) - the *Insolvency Practice Schedule*
- Federal Court decision of *Rambaldi v Meletsis*
- Hypothetical facts scenario
- Questions

## Right to assign prior to *Insolvency Practice Schedule*

- Section 477(2)(c) of the *Corporations Act*.
- The right of a liquidator to dispose of the property of a company in liquidation.
- Limited common law rights, which (among other things) permitted the assignment of debts.

## **Assignment under the *Insolvency Practice Schedule***

- Section 100-5 of the *IPS (Corporations)*
- Section 90-20(1)(a) of the *IPS (Bankruptcy)*
- Additional matters

## Section 100-5 of the *IPS (Corporations)*

External administrator may assign right to sue under this Act

(1) Subject to subsections (2) and (3), an external administrator of a company **may assign any right to sue** that is conferred on the external administrator by this Act.

(2) If the external administrator's **action has already begun**, the external administrator cannot assign the right to sue unless the external administrator has the **approval of the Court**.

(3) **Before assigning** any right under subsection (1), the external administrator must give **written notice to the creditors** of the proposed assignment.

(4) If a right is assigned under this section, a reference in this Act to the external administrator in relation to the action is taken to be a reference to the person to whom the right has been assigned.

## Section 90-20(1)(a) of the *IPS (Bankruptcy)*

Application for Court order

(1) Each of the following persons may apply for an order under section 90-15:

**(a) a person with a financial interest in the administration of the regulated debtor's estate;**

(b) if the committee of inspection (if any) so resolves--a creditor, on behalf of the committee;

(c) the Inspector-General.

## Additional matters to consider

- Section 477(2B) of the *Corporations Act*
- Section 20 of the *Property Law Act 1969* (WA) (the **PLA**)

## Section 477(2B) of the *Corporations Act*

Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company's behalf (for example, but without limitation, a lease or a an agreement under which a security interest arises or is created) if:

- (a) without limiting paragraph (b), the term of the agreement may end; or
- (b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;

more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months.

## Section 20 of the *PLA*

(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim that debt or chose in action, is effectual in law (subject to equities having priority over the right of the assignee), to pass and transfer from the date of the notice —

- (a) the legal right to that debt or chose in action;
- (b) all legal and other remedies for the debt or chose in action; and
- (c) the power to give a good discharge for the debt or chose in action, without the concurrence of the assignor.

## ***Rambaldi v Meletsis* – its significance**

The recent decision provides important guidance to:

- bankruptcy trustees as to their power under the *Bankruptcy Act* to acquire assignable claims; and
- insolvency practitioners generally as to the right to seek judicial direction.

In this case, the plaintiff trustees were found to have power to acquire certain litigation claims and the Court granted the judicial direction they sought.

## ***Rambaldi v Meletsis* – the facts**

The bankrupt, Mr Karas (**Bankrupt**), obtained a mortgage (the **Mortgage**) over certain real property (the **Property**) formerly owned by 70 Nicholson Street Pty Ltd (in liquidation) (the **Company**) prior to his bankruptcy.

Steps were then taken by the Company to sell the Property as part of what the Court described as a ‘concerted plan’ to discharge the Karas Mortgage for nil consideration.

The Trustees also took legal advice in respect of any claims that the Liquidator might have in relation to the sale of the Property.

## ***Rambaldi v Meletsis* – continued**

In July 2017 the Trustees and the Liquidator met and discussed the potential of an assignment of litigation claims in relation to the conduct of:

- the Company’s director at the time of the sale;
- the purchaser of the Property, a related entity which allegedly took the benefit of the proceeds of sale of the Property; and
- another individual allegedly involved in the transaction.

(the **Defendants**)

## ***Rambaldi v Meletsis* – continued**

The Trustees subsequently offered \$25,000 for the assignment of the claims which the Liquidator and subsequently creditors approved. By Deed of Assignment in September 2017 those claims were assigned.

In November 2017 the Trustees commenced these proceedings seeking (variously and among other things) equitable compensation and claims under sections 120 and 121 of the *Bankruptcy Act* against the Defendants.

## ***Rambaldi v Meletsis* – continued**

The decision concerned two substantive questions:

- whether the Trustees had the power to acquire the assigned claims from the Liquidator; and
- if the Trustees had that power, whether the Court should give the judicial guidance sought.

## ***Rambaldi v Meletsis* – the Decision**

The Trustees argued that the powers exercisable at the discretion of a bankruptcy trustee under section 134 of the *Bankruptcy Act* were sufficiently broad to provide for the power to acquire the assigned claims.

The Court found that but for the question of what constituted property of the Bankrupt the Court would certainly have decided that the Trustees had the requisite power in section 134 of the *Bankruptcy Act*. It found (and the Defendants conceded) those powers were expressed widely and in general terms and broadly enough to include the power to acquire property.

## ***Rambaldi v Meletsis* – continued**

The Court took the view that the Trustees acquired the claims using funds from the Bankrupt's estate for the benefit of the Bankrupt's creditors and thus not only were the causes of action 'after-acquired' property of the Bankrupt for the purpose of section 116 of the *Bankruptcy Act*, but they were clearly 'property' within section 5 of the *Bankruptcy Act*.

In light of these matters the Court found that yes, the Trustees had such power, and yes, the Court should give the judicial guidance sought.

## Comment

- This recent legislative change (outlined above) provides a process both for the assignor of legitimate causes of action and the assignee (as in the case of *Rambaldi v Meletsis*), in the case of both bankruptcy trustees and external administrators in corporate matters
- Practitioners should generally seek appropriate legal advice on the merits of any assignable claims

## Hypothetical scenario: Megan Markie meets the Windsors

- Megan Markie (**Megan**), registered liquidator and appointed administrator of Windsor Country Club Pty Ltd (**Windsor**)
- Windsor has seemingly no assets
- Windsor may have a claim against Plebeians Labour Hire Pty Ltd (**Plebs**) valued at \$10 Million (**Claim**)
- Plebs vigorously dispute the Claim
- The Claim is one of the only realisable assets available to Windsor's creditors
- Windsor has no available funds to pursue the Claim
- Malcolm Turnaprofit of Republican Litigation Solutions Pty Ltd (**Republican**) agrees to fund the Claim

## Questions for discussion - #1

Assuming Megan is the Voluntary Administrator, or Deed Administrator, what steps should Megan take to explore avenues and secure funding?

- What should Megan consider in making a reasonable commercial assessment of any claim?
- What should Megan consider in making a reasonable commercial assessment of any litigation funding agreement?

## Questions for discussion - #2

Would the same course of action be available if Megan was pursuing a claim in her capacity as liquidator against the directors of Windsor, Philip Footinmouth (**Flip**) and Charles Polo (**Charlie**) for insolvent trading?

## Questions for discussion - #3

If Megan has ascribed a value to the claim, what should she consider when seeking to realise the claim?

## Questions for discussion - #4

What procedural requirements will apply in order for a chose in action to be assigned by Megan to Republican? Are there further requirements to seek the court's approval?

## Questions for discussion - #5

Imagine that Megan wishes to assign a claim to the bankruptcy trustee of a former mortgage holder of property owned by Windsor, Harry Armband (**Harry**) under the *Bankruptcy Act*.

## Questions for discussion - #6

In this scenario, would the answers change?

What would or could Harry's bankruptcy trustee do, in order to gain certainty around the assignment?

# Questions?

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A panoramic view of a city skyline at sunset. The sky is filled with soft, golden clouds, and the sun is low on the horizon, casting a warm glow over the buildings. In the foreground, there are modern architectural structures, including a prominent curved bridge over a body of water. The overall scene is vibrant and captures the beauty of an urban landscape during the 'golden hour'.

# CITY INSOLVENCY DISCUSSION GROUP

Next CIDG Session

**Wednesday, 7 November 2018**

**HLB** Mann Judd  
(Insolvency WA)  
Chartered Accountant

 **GREGSONS**  
AUCTIONEERS & VALUERS

Willis **CKA**