

City Insolvency Discussion Group



Chartered Accountant



CHARTERED ACCOUNTANTS
AUSTRALIA • NEW ZEALAND

Wednesday, 1 November 2017

Topic

Channel 10 case, specifically:

- The relevant legal principles and the test;
- When a Court will remove a Voluntary Administrator due to a lack of independence;
- What steps can insolvency practitioners take to protect themselves from a perceived lack of independence; and
- Whether Voluntary Administrators can undertake work prior to their appointment.

Presented by

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Tegan Healey - Law Graduate, Lavan

Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed) [2017] FCA 914 (the Ten Network Case)

Dan Butler
Tegan Healey
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Introduction

- Key issue:
 - Court required to consider whether administrators could stay on given their prior involvement with the company.
- Answer? Yes they could (subject to limitations).
- Importance:
 - Guidance.
 - Pre-appointment work.
 - ARITA Code.

Today

- Overview of facts of Ten Network Case.
- Summary of post-case events.
- Consideration of relevant legal principles.
- Status of ARITA Code.

Background

- Ten Network Holdings (**Ten**) publicly- listed parent of various entities conducting internet and television businesses.
- Ten Group experiencing financial difficulties for some time.
- Losses of circa \$1.5bn.
- \$73.8m owed to financiers.
- \$215m owed to creditors.

Background (continued)

- Ten sought to renegotiate valuable contracts with content providers (including CBS) and extend loan facilities.
- Ten's lawyers, Gilbert + Tobin, engaged administrators' firm in February 2017, ostensibly to assist in assessing Ten's financial position.

Background (continued)

- The engagement letter:
 - KM will seek instructions only from G + T.
 - All advice to be provided by KM to G + T.
 - At no stage will KM assume any role in advising the company's board or individual directors on their duties under the Corporations Act, the management of the company or in managing the affairs of the Company
- KM's evidence:

the scope of the work limited to ensure KM would be in a position to accept the appointment of administrators...in the future.

Work done by KM

- So what did KM do?
 - Assisted with ‘contingency plan’.
 - Specifically:
 - Assisted with renegotiating contracts with content providers and lenders.
 - Assisted G + T in considering the financial position of the Ten Group.
 - Provided an administration plan.
 - Held meetings with Ten.
 - \$1m pre-appointment fees.

Key events

- 14 June 2017: Appointment as voluntary administrators.
- 19 and 21 June 2017: ASIC writes to administrators re adequacy of DIRRI.
- “In our opinion, your DIRRI may not adequately describe the circumstances of your appointment to allay potential concerns about a perceived lack of independence”.
- “Consider whether you should revise your DIRRI for additional disclosures about the circumstances of your appointment”.
- 22 June 2017: Updated DIRRI lodged.

Issue for Court

- Whether the Administrators could continue to act, when, in their prior capacity, as “potential” administrators, they had a recent, long-term, substantial and remunerative involvement with the Ten Group.

Legal test

- Apprehended bias:
 - fair-minded lay observer might reasonably apprehend that the administrators might not bring an impartial mind.

BUT... would removing administrators be “**for the better conduct of the administration**”?

Apprehension of bias?

- No apprehended bias in relation to:
 - Sheer volume of work, length of pre-appointment and remuneration.
- Apprehended bias in relation to:
 - Appointed by Gilbert + Tobin
 - Have to investigate own remuneration as preference.

Should they be removed?

- Removal for the ‘better conduct of’ administration?
 - Disproportionate response.
 - Unnecessary in view of agreed orders under section 447A:
 - Peter Gothard from Ferriers to report.
 - Ultimately found that payments weren’t likely to be unfair preferences on a preliminary basis.

Disclosure cure apprehension of bias?

- No.
- Disclosure itself does not cure apprehension of bias.

Steps

- Clear engagement letter and retainer.
- Record of nature of tasks.
- Ensure company knows you could become administrator.

Pre-appointment work

- Utility of pre-appointment work:
 - Improved value recovery.
 - Flexibility.
 - Lower cost.

ARITA Code

- Useful document.
- No legal status.
- Note 2 year rule.

Conclusion

- Fair-minded lay observer might reasonably apprehend bias.
- Even if apprehended bias, is removal for the better conduct of the administration?
- Utility in pre-appointment work.
- Can remedy apprehended bias.
- Ensure clear retainer and engagement letter.
- Keep record of work undertaken.
- What happened next?

Questions?

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Next CIDG session:

Wednesday, 6 December 2017