IN FOCUS

AUGUST 2020

WHAT MAKES YOU SO SPECIAL ?

HALL CHADWICK

WHAT MAKES YOU SO SPECIAL?

The mechanism of special purpose liquidation was once pretty much unheard of, but it has increasingly been in vogue since perhaps its most well known example the "One Tel Case"

A special purpose liquidator is a liquidator appointed to carry out a specific function in the liquidation in circumstances where it is "just and beneficial" to do so.

Examples of such circumstances may be:

- Where a conflict of interest exists in respect of a liquidator; and/or
- Where a creditor wishes to fund/ indemnify recovery action in the liquidation which the incumbent is either not prepared to undertake or is unfunded.

The power to appoint a special purpose liquidator

For appointments prior to 1 September 2017

Section 511 of the Corporations Act provided (ie it has been repealed)

1. *The liquidator or any contributory or creditor may apply to the court:*
   a. *To determine any questions arising in the winding up of a company;*
   b. *To exercise all or any of the powers that the court might exercise if the company were being wound up by the court;*
2. *The Court if satisfied that the determination of the question or the exercise of power will be just and beneficial may accede wholly or partially to any such application, on such terms and conditions as it thinks fit, or make such order on the application as it thinks just.*

For appointments post 1 September 2017

Section 90-15 of the Insolvency Practice Schedule provides

1. *The court may make such orders as it thinks fit in relation to the external administration of a company*

Implications

It is clear that legislative power exists for the appointment of special purpose liquidators. It is at least debatable whether the same can be said for the recent development of special purpose administrators.

On one view the appointment of a special purpose liquidator to resolve conflicts of interest in most cases should be redundant with the development of more detailed guidelines surrounding conflicts of interest. The position should be that a general purpose liquidator with a conflict of interest should not be appointed to the role of liquidator in the first place and if such conflict manifests itself in the course of an appointment the appropriate course of action is for the incumbent general purpose liquidator to resign the appointment.

The appointment of the 'One Tel' special purpose liquidator itself arose due to the perception of a potential conflict of interest in the general purpose liquidator and one wonders if the matter would have proceeded differently in the current climate with respect to declarations of interest that could be perceived to give rise to a conflict of interest.

Accordingly, it would seem the role of special purpose liquidator is more appropriate to the circumstance where a creditor wishes to fund an alternate liquidator to conduct discrete investigations, examinations and/or recovery action which the incumbent liquidator is either not prepared to do or not in a position to fund.

A special purpose liquidator might also be considered by a creditor as an alternative to the outright replacement of an appointed creditors voluntary liquidator which can be problematic due to the necessary majority required for replacement and the amendments to the Corporations Act in 2017 which introduces an element of discretion in the appointed liquidator as to whether to convene a meeting of creditors to consider replacement

Special Purpose Administrators

A far more exotic species of appointment is the special purpose administrator. The most well known case of appointment of special purpose administrator is ***(in the matter of Ten Network Holdings Ltd (Administrator Appointed)(Receivers and Manager' Appointed) [2017] FCA 914)***

In that case the appointed administrators had held in excess of 50 meetings over a 3 month period pre appointment with Ten group management, directors, financiers, shareholder guarantors and advisors.

The appointed administrators had received more than $1million of remuneration for the pre appointment work and had been engaged by the lawyers acting for the Ten Group.

The Court invoked Section 447A of the Corporations Act to appoint "special purpose administrators" for the limited role of preparing a report for inclusion in the Section 439A(4) report as to whether any recovery action may be available in a liquidation in respect of

- Any claims arising from the conduct of Directors, Officers, Advisors, the lawyers and/or the administrators firm prior to the appointment of administrators;
- Whether the remuneration rendered by the administrators firm in respect of work undertaken prior to the appointment of the first plaintiffs were voidable preferences.

Power to appoint special Administrators

The Power to appoint a special administrator is said to derive from Section 447A of the Act which provides:

The Court may make such order as it thinks appropriate about how this part is to operate in relation to a particular company;

Implications

- There is a certain air of unreality about the Ten Network Holding case, the orders themselves reflect there was a potential for conflict that it is difficult to see how the administrators were permitted to retain the appointment. ASIC was acting as amicus curae i.e friend of the court - no creditors actually appeared to oppose the administrators appointment – one wonders if the result would have been the same had that occurred.
- Interestingly, this is not the first time Section 447A has been contemplated to appoint special purpose administrators.

The Western Australian decision of ***Westgem Investment Pty Ltd (Receivers and Managers Appointed) No 3 [2012] WASC 360*** noted.

- the decision to appoint a special purpose administrator must be made on a case by case basis;
- special purpose administrators can be appointed to deal with perceived conflicts of interest and if necessary to cure actual conflicts; and
- an Administrator's prior involvement will not itself create a conflict of interest if that Administrator is then appointed to the company. However substantial involvement with the company may gave rise to a conflict of interest;

As a matter of principle it is debatable whether the concept of special purpose administrator is really one that was contemplated by the legislature, when Part 5.3A of the Act was introduced to the Law.

Voluntary administration is intended as an interim administration, which is to last for a relatively short period of time, and it's intended to be an inexpensive process with minimal court involvement.

These guiding principles are difficult to reconcile with a second Administrator acting at the creditors expense.

This is to be contrasted with liquidation where in appropriate circumstances there may be a role to play by special purpose liquidators.

The language of Section 447A has been increasingly contorted in recent times with the court arguably going dangerously close to introducing concepts which are more appropriately the role of the legislature.

Given the transitional nature of a voluntary administration and the detailed guidelines surrounding conflicts of interest, whether actual or perceived, the use of special purpose administrators should only be permitted in limited circumstances.

HALL CHADWICK

For more information, please contact your local Hall Chadwick office:

NEW SOUTH WALES
Level 40, 2 Park Street
Sydney NSW 2000
Tel: +61 2 9263 2600
sydney@hallchadwick.com.au

QUEENSLAND
Level 4, 240 Queen Street
Brisbane QLD 4000
Tel: +61 7 3211 1250
brisbane@hallchadwick.com.au

SOUTH AUSTRALIA
Suite 201, Level 2, 147 Pirie Street
Adelaide SA 5000
Tel: +61 8 8545 8422
adelaide@hallchadwick.com.au

WESTERN AUSTRALIA
Level 11 Allendale Square,
77 St Georges Terrace Perth WA 6000
Tel: +61 8 6557 6200
perth@hallchadwick.com.au

VICTORIA
Level 14, 440 Collins Street
Melbourne VIC 3000
Tel: +61 3 9820 6400
hcm@hallchadwickmelb.com.au

NORTHERN TERRITORY
Paspalis Business Centre
Level 1, 48-50 Smith St Darwin NT 0800
Tel: +61 8 8943 0645
darwin@hallchadwick.com.au

If you have questions or need any further assistance please contact our office:

BLAIR PLEASH | PARTNER

bpleash@hallchadwick.com.au
+61 2 9263 2600