SQUIRE PATTON BOGGS

Liquidators and Administrators May Start to Feel ASIC's "Why Not Litigate?" Approach Bite

It has been widely reported that, post Banking Royal Commission, the Australian Securities Investigation Commission (ASIC) will take a "why not litigate?" approach. As we foreshadowed in an article last month, this scrutiny will not be confined to the banking sector but is likely to extend to anyone subject to ASIC oversight.

While we achieved an emphatic vindication of our client in the recent *ASIC v Wily* matter discussed below, the fact remains that liquidators and administrators will face more frequent and more intense surveillance by the regulator.

If you require assistance in responding to a notice or an enquiry by ASIC (or another regulator), we have an expert team available to help.

About the Decision

In late 2016, ASIC commenced proceedings against Andrew Wily and David Hurst in respect of their conduct concerning a number of companies over which they had been appointed as joint and several liquidators in 2009. As part of the proceedings, ASIC sought an order for an inquiry, pursuant to s 536 of the Corporations Act, into the conduct of Messrs. Wily and Hurst and, among other relief, orders prohibiting the liquidators from continuing to act in that capacity and otherwise having their registration as liquidators cancelled. On 9 May 2019, Brereton J dismissed ASIC's proceedings and awarded costs in favour of Messrs. Wily and Hurst. In doing so, the court found:

- Despite its serious allegations of misconduct and, specifically, conflict of interest in accepting certain appointments, against the liquidators, ASIC was unable to allege, let alone determine, who the common referrer was in respect of the external administrations in question and how that person's referrals led to the liquidators occupying an undisclosed conflicted position.
- ASIC's inability to identify the common referrer central to the allegedly conflicted appointments was telling, particularly given the extensive investigation ASIC had conducted prior to commencing the proceedings and the significant investigative powers at its disposal. In those circumstances, at the highest, the court was left "merely wondering", as distinct from entertaining a "positive feeling of actual apprehension" of conflict or wrongdoing.
- ASIC contended, rightly, that liquidators must be and appear to be independent and impartial. However, it did not allege that the liquidators were other than independent and impartial; only that they should have recognised a potential for conflicts and, on that account, declined to act. But a mere potential for conflicts to arise – even if there was one – did not require the liquidators to decline to act.
- ASIC failed to establish its case in relation to the concerns around conflicts of interests and, in any event, a potential for conflicts, as distinct from actual conflicts, did not preclude the liquidators from acting, and no actual conflict was identified by ASIC.
- ASIC failed to establish that the liquidators' Declarations of Relevant Relationships and Indemnities (DIRRIs) were deficient or in any way misleading.
- The mere fact that a person is a director of a company that goes into liquidation does not mean that the liquidator has a relevant relationship with that person within the meaning of the disclosure required for DIRRIs. Creditors of a company going into liquidation would not think that the liquidator's impartiality might potentially be affected merely by his or her having previously been the liquidator of another company whose director was also the director of the current company.
- A liquidator's s 533 Report does not include an obligation to report on whether any shadow directorships might have impacted a company other than to address the question of whether, "in the opinion of the liquidator", there are any shadow directors. The liquidators answered that question in the negative and, absent an allegation that the question had been answered deliberately falsely, there was no compelling reason justifying an inquiry in relation to the liquidator's s 533 reporting.
- Absent an allegation that the liquidators were aware of, or had involvement in, phoenixing activities, it was not readily apparent to the court how it could form the view that the liquidators' conduct was wrongful, let alone how they could be culpable for a failure to report the activity.

In considering the discretionary factors relevant to determining whether an inquiry into the liquidators' conduct should be ordered, the court noted that:

- Insofar as the strength and nature of the allegations were concerned, the court was not satisfied that there was a well-based suspicion indicating a need for further investigation into the relevant conduct and external administrations.
- Insofar as delay was concerned, the court determined that it was not reasonable for ASIC to defer commencing its investigations into the relevant external administrations until its other investigations concerning Mr. Wily had firstly terminated with no adverse action. The court determined that "Indeed, there is a significant element of vexation in deferring one investigation – in effect, holding it in reserve, until the other had come to nothing".
- There would be limited utility in any inquiry, even if the grounds for one could be established, given Mr. Wily had long retired and ceased practice as a liquidator and Mr. Hurst had continued to practice, without any complaint or concern being raised, since 2012.
- It was open to ASIC to take alternative approaches, including by conducting its own inquiry and reporting back to the court in respect of its findings or, alternatively, if it felt compelled, by applying to CALDB for the cancellation of the liquidators' registrations under s 1292(3) of the Corporations Act.

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