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Insolvency Practice in the Corporations List of the Supreme Court of New South Wales

Justice Ashley Black

Supreme Court of New South Wales

I will deal with several aspects of insolvency practice in the Corporations List, some of which involve issues that also arise in litigation in the Equity Division generally. I will also deal with several issues of law and practice that arise in particular categories of insolvency cases in the Corporations List.

The structure of the Corporations List

The general structure of the Corporations List has remained the same for at least ten years, hopefully because it is filling a need among users of the Court's services.[1]

Practice Note SC Eq 4 deals with practice in the Corporations List. The Practice Note indicates that all proceedings and applications in the list, other than those in the Corporations Registrar's List, are case managed by the Corporations List Judge with the aim of achieving a speedy resolution of the real issues in the proceedings, and the Corporations Duty Judge is available at all times to hear urgent applications in Corporations matters. The Practice Note identifies matters that are appropriate for the Corporations List as including any proceedings or applications under or in respect of matters relating to the *Corporations Act* 2001 (Cth), the *Australian Securities and Investments Commission Act* 2001 (Cth), the *Cross-Border Insolvency Act* 2008 (Cth) and the Supreme Court (Corporations) Rules 1999 (NSW).

Directions are given in Corporations matters in the Corporations List heard before the Corporations Judge on Monday mornings, with motions called at 9:45am and directions at 10am. On most Mondays, two judges are available and additional judges will from time to time be available to assist with hearing matters. Typically, all motions listed will be heard on that day if they are ready to proceed, and matters suitable for short hearings (usually less than two hours) can also be heard in that way. Consent orders can be made in chambers to avoid the need for an appearance in the list. Cases are case-managed in the list and allocated a hearing date when they are ready for hearing. It is also possible to make contact with the Associate to the Corporations List Judge to obtain fixed hearing dates for schemes of arrangement under Part 5.1 of the *Corporations Act* and other matters in which it is commercially important to obtain definite hearing dates before filing.[2] This is commonly done and such requests are readily accommodated.

Registrars also sit in liquidators' examinations and hear some applications in the

[1] See, for example, the description of the operation of the list in RP Austin, "Some Reflections on Managing Corporate and Commercial Cases", Law Council of Australia Business Law Section Workshop 2004

[2] Practice Note SC Eq 4 paragraph 13.

Corporations List, pursuant to a delegation made by the Chief Justice on 12 December 2012, underpinned by the *Civil Procedure Act* 2005 (NSW).

Urgent applications

Urgent corporations matters are listed by approaching the Corporations Duty Judge in Court or in chambers, preferably after notice of the approach has been given to his or her Associate by telephone or email. The Court may grant relief before the commencement of proceedings and, in such an application, the plaintiff is taken to give an undertaking to file proceedings within the time directed by the Court, or within 48 hours if no direction is made.[3] The applicant's solicitor will need to undertake to pay the appropriate filing fee in respect of the originating process and the judge will typically make a direction that the orders be entered forthwith, with the result that the order is taken to be entered when it is signed and sealed by the Registrar.[4]

For example, an application for abridgement of the time for service of an originating process and applications for ex parte relief, including applications for urgent interlocutory injunctions or the appointment of a receiver, will be made under this rule. In determining whether to abridge the time for service of proceedings, the Court is likely to have regard to factors such as the urgency of the proceedings and the fact that it is desirable that the defendant at least have sufficient time to obtain legal advice and representation. It will generally be desirable that notice of an application, even if it is to be made on an ex parte basis, has been given to the defendant, unless the giving of such notice would prejudice the utility of the relief, for example where a freezing order or search order is sought. It is, of course, well established that an applicant for ex parte relief must make full disclosure of relevant matters to the Court, and a failure to make proper disclosure or warrant an order dissolving the ex parte relief without prejudice to a further application.[5]

When an interlocutory injunction is sought, it is necessary to have regard to the principles outlined by the High Court in *Australian Broadcasting Corporation* v *O'Neill* [2006] HCA 46; (2006) 227 CLR 57 at [65]. Those principles were helpfully reviewed, in the context of proceedings under the *Corporations Act*, in *Stratford Sun Ltd* v *OM Holdings Ltd* [2011] FCA 414; (2011) 83 ACSR 84 at [7]ff. In *Capgemini US v Case* [2004] NSWSC 674 at [40], Campbell J observed that the Court may have regard to delay in assertion of a plaintiff's rights as relevant to the grant of injunctive relief, not only by reason of the principle that injunctive relief should be sought promptly, but also as a matter which goes to the balance of convenience.

Discovery and notices to produce

Procedures for discovery in the Commercial List and Technology and Construction List,

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[3] UCPR r 25.2.
[4] UCPR r 36.11(2A).
[5] *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 955 at [38]; *Harrem Pty Ltd v Tebb* [2006] NSWSC 1415; PLG Brereton, "Practice and Procedure before the Duty Judge in Equity", 14 August 2008, p 4.

including processes for electronic discovery, also apply in Corporations matters.[6] Practice Note SC Eq 11, "Disclosure in the Equity Division" (26 March 2012) now applies to proceedings in the Corporations List, as to proceedings in the Equity Division generally. That Practice Note provides, relevantly, that:

- The Court will not make an order for disclosure of documents until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating disclosure (para 4).

- There will be no order for disclosure in any proceedings in the Equity Division unless it is necessary for the resolution of the real issues in dispute in the proceedings (para 5).

- Any application for an order for disclosure, consensual or otherwise, must be supported by an affidavit setting out specified matters, including the reasons why disclosure is necessary for the resolution of the real issues in dispute in the proceedings (para 6).

The purpose which is served by Practice Note SC Eq 11 was identified by McDougall J in *Leighton International v Hodges* [2012] NSWSC 458 at [4]-[7], where his Honour noted that that Practice Note was the latest step taken by the Court in its efforts to deal with the costs of litigation, particularly so far as it concerns the costs of discovery of electronic material. The manner in which proceedings will be conducted in the vast majority of cases in the Equity Division of this Court, as contemplated by that Practice Note, was described by Bergin CJ in Eq in *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analyst Group Pty Ltd* [2012] NSWSC 393 at [65]-[66], commencing with the plaintiff's service of the evidence including documents on which it relies, followed by the defendant's service of the evidence including the documents on which it relies, so that the real issues in proceedings are confined not only by the pleadings but also by the evidence. That approach will serve the purpose of the Practice Note, of seeking to do what can be done in the vast majority of cases to avoid unnecessary discovery.

The Practice Note contemplates that the Court may make an order for disclosure before the parties, or one of them, have served their evidence where there are "exceptional circumstances necessitating disclosure". In *Leighton International v Hodges* above at [19] McDougall J noted that there can be no all-encompassing definition of "exceptional circumstances"; what is required is an assessment of the relevant provision and its application in the particular case; and such circumstances require something more than circumstances which are regularly, routinely or normally encountered. His Honour observed (at [20]), in a passage which was approved by Stevenson J in *Owners Strata Plan SP 69567 v Baseline Constructions Pty Ltd* [2012] NSWSC 502 at [30], that:

> "As a matter of language, something is exceptional if it is out of the ordinary or unusual. To my mind, the exceptional circumstances referred to in paragraph 4 of the Practice Note must be circumstances that are not normal, or usual; they must be something out of the ordinary; they need not

[6] Practice Note SC Eq 3, paragraphs 27 – 32, applied to corporations matters by Practice Note SC Eq 4 paragraph 23,

> be unique; but however one characterises them they are not "exceptional" at large but "exceptional" because they necessitate disclosure."

In *Naiman Clarke Pty Ltd v Tuccia* [2012] NSWSC 314 at [26], Ball J similarly noted that the Practice Note does not prohibit disclosure before evidence is served and also observed that the requirement of exceptional circumstances might be met where information necessary for one party's case was solely within the knowledge of another party from which disclosure was sought. In *Danihel v Manning* [2012] NSWSC 556 at [16] Bergin CJ in Eq noted that "exceptional circumstances", for the purposes of Practice Note 11, may be established by demonstrating the necessity to obtain documents to fairly prepare a case for trial, that is, that the party is unable to serve its evidence without certain documents. In *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [2012] NSWSC 913 at [17], Gzell J reviewed these authorities and emphasised the need for "caution against setting the bar too high". His Honour observed that:

> "To be exceptional the circumstance need not be unique or unprecedented or very rare. What is needed is an appraisal of all the circumstances and the context in which the expression must be satisfied. Are there circumstances necessitating disclosure before evidence in the sense that the party's case cannot be put without the disclosure? Are those circumstances exceptional?"

The Practice Note also provides that disclosure will be ordered only when it is "necessary" for the resolution of the real issues in dispute. In *Leighton International* at [22], McDougall J noted that this contemplates that disclosure is shown to be:

> "reasonably necessary for disposing of the matter fairly or in the interests of a fair trial".

In that case, his Honour allowed disclosure where the plaintiff did not have sufficient documents otherwise to make out its case.

The Practice Note does not, in terms, apply to notices to produce because such notices do not seek an order for "disclosure of documents". However, in *Baseline Constructions* above at [23]-[24] Stevenson J observed that "[I]t would subvert the intended operation of the Practice Note if parties could avoid its operation by adopting the expedient of serving a notice to produce, rather than seeking an order for disclosure" and that a notice to produce served with the object of avoiding the operation of the Practice Note might well constitute an abuse of the Court's process. That view has been followed in other cases.[7] Recent applications of these principles include *Bauen Constructions Pty Ltd v New South Wales Land & Housing Corporation* [2014] NSWSC 684; *Noun v Pavey* [2014] NSWSC 429 and *Rhinehart v Rhinehart* [2015] NSWSC 205.

Conduct of a hearing

Evidence in proceedings in the Corporations List (other than in interlocutory applications) is to be served on other parties but not filed with the Court until the hearing, and Practice

[7] For example, *Re Mempoll Pty Ltd, Anakin Pty Ltd & Gold Kings (Australia) Pty Ltd* [2012] NSWSC 1057.

Note SC Eq 4 contemplates that documents will generally be contained in a court book in chronological order rather than annexed to or exhibited to affidavits.[8] This practice is plainly preferable in more complex matters, although it is not universally adopted in simpler applications in the Corporations List and the Court tends to take a pragmatic approach in that regard.

When a matter is listed for hearing, the Court will typically make the usual order for hearing. That order is specified in Appendix 1 to Practice Note SC Eq 1 and deals with the preparation of a court book containing all evidence, any objections to it and short outlines of submissions. Parties should seek to avoid leading substantial affidavits at a very late stage. It is common practice in the Corporations List that, when fixing a matter for hearing, the Court will also make a direction that that affidavits served after the date specified in the directions may not be read without leave of the Court. It cannot be assumed that such leave will be granted. First, s 61(3) of the *Civil Procedure Act* 2005 (NSW) provides that, if a party to whom a direction has been given fails to comply with it, the Court may disallow or reject any evidence that party has adduced or sought to adduce. Second, r 10.2 of the Uniform Civil Procedure Rules provides that a party intending to use an affidavit that has not been filed must serve it a reasonable time before the occasion for using it arises, and a party who fails to serve an affidavit as required by that rule must not use it except by the Court's leave. The Court's power to disallow or reject an affidavit under *Civil Procedure Act* s 61(3) and to grant or withhold leave to read it under UCPR r 10.2 must be exercised in accordance with the obligations imposed by ss 56-60 of the *Civil Procedure Act* and specifically the overriding purpose and the objectives of case management. The Court may well decline leave to read a later affidavit where doing so would cause prejudice to the other party, particularly if that prejudice cannot readily be accommodated by an order for costs or an adjournment; for example where allowing that affidavit to be read would require an adjournment of the final hearing where a matter involves any degree of urgency.[9]

The Court may also allocate blocks of time, in proceedings in the Corporations List, for examination in chief, cross-examination, re-examination and submissions.[10] This practice is not generally adopted in the Corporations List, but might well be adopted in matters where there is particular urgency or where the length of the hearing would not otherwise be consistent with the just, quick and cheap resolution of matters in dispute as required by s 56 of the *Civil Procedure Act*. The Court has statutory power to impose time limits on cross-examination under s 62 of the *Civil Procedure Act*.

Expert evidence

The process for expert evidence in the Corporations List reflects developments in the Court's practice as to expert evidence generally. The parties must first seek directions

[8] Practice Note SC Eq 3 paragraphs [33]-[36], applied to corporations matters by Practice Note SC Eq 4 paragraph 24.
[9] See, for example, *Re Cancer Care Institute of Australia Pty Ltd (admin apptd)*, unreported 24 January 2013.
[10] Practice Note SC Eq 3 paragraphs [50]–[53], applied to corporations matters by Practice Note SC Eq 4 paragraph 25.

from the Court if they intend to induce, or it becomes apparent that they may adduce, expert evidence at trial and, in the absence of such directions, expert evidence may not be adduced at trial unless the Court otherwise orders.[11] Rule 31.26 sets out examples of directions that the Court may make. It is now common for concurrent expert evidence to be given. The process involves experts being sworn together, followed by a discussion in which each expert has the opportunity to ask questions of the other and Counsel have the opportunity to ask questions to test the expert evidence, and the judge will typically ask at least "wrap-up" questions.[12] The Court may now order, at any stage of proceedings, that an expert be engaged jointly by the parties.[13] The Court may also appoint its own expert, as distinct from the parties' single expert, although that practice is perhaps less common. Where a single expert engaged jointly by the parties or a court-appointed expert has been called in respect of an issue, the parties may not adduce further expert evidence on the issue other than with the Court's leave.

Mediation

Part 4 of the *Civil Procedure Act* provides for mediation.[14] Either a Registrar or a private mediator retained by the parties may be appointed as mediator. The parties are under a statutory duty to participate in the mediation in good faith. The Court will typically be conscious of the question when a mediation is most likely to be effective, for example, whether there would be a cost advantage in ordering mediation before the costs of the proceedings have escalated, or whether it is preferable that any mediation take place after affidavits have been filed so that the parties have a better understanding of the evidence on which they respectively rely. It is, of course, now well established that the Court has power to order mediation, even over the opposition of a party to the proceedings.[15]

The Court is likely to take an interest in whether a complex matter has been the subject of mediation, particularly where it involves a commercial dispute which may be capable of commercial resolution, or an application to wind up a company for oppression or on the just and equitable ground, or arises in a closely held company or in a family context. On the other hand, some of the matters that are heard in the Corporations List will involve issues of law where mediation may well not be particularly useful or cost-effective.

Representation of companies by their directors

A question arises from time to time whether a director should be granted leave to represent a company in proceedings in the Corporations List. It is, of course, well established that a natural person may represent himself or herself in proceedings before the Court. The position in proceedings involving a corporation is different, because

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[11] UCPR r 31.19.
[12] P McClellan, "Litigation: Some Contemporary Issues", 26 March 2009, pp 14 – 15
[13] UCPR r 31.37.
[14] That term is defined in *Civil Procedure Act* s 25 as a "structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute".
[15] *Idoport Pty Ltd v National Australia Bank* [2001] NSWSC 427; *Higgins v Higgins* [2002] NSWSC 455.

UCPR r 7.1(3) provides that, in the case of proceedings in the Supreme Court, a company may commence proceedings by a director only if a director is also a plaintiff in the proceedings, and that requirement will only be satisfied if the director personally is a proper party to the proceedings. This will not always be the case; for example, a director is not a proper plaintiff in an application to set aside a statutory demand. The Court may dispense with the requirements of those rules pursuant to s 14 of the *Civil Procedure Act* 2005.[16] A failure to commence the proceedings by a solicitor is an irregularity that does not invalidate the proceedings.[17]

Some issues arising in insolvency applications in the Corporations List

Proceedings in the Corporations List are, of course, governed by the Uniform Civil Procedure Rules generally, but also by the Uniform Corporations Rules adopted by the Federal Court of Australia and the state Supreme Courts for Corporations matters, relevantly the Supreme Court (Corporations) Rules 1999. The Corporations Rules require some differences in procedure from those set out in the Uniform Civil Procedure Rules, and also require particular steps in particular applications.

Where an application is not made in a proceeding already commenced in the Court, it is to take the form of an originating process (rather than a Summons or Statement of Claim); and, in any other case, an interlocutory process is to be filed, even if the relief claimed is final relief. The forms of originating process and interlocutory process are specified in Corporations Forms 2 and 3.[18] The originating process in Corporations matters is not in the form of a pleading but the Court may make an order for the matter to continue by pleadings.[19] A judgment in default of filing a defence is only available under the Uniform Civil Procedure Rules after an order for pleadings has been made and a Statement of Claim has been filed, and a party cannot unilaterally put itself in a position to obtain default judgment by filing a statement of claim without first having obtained an order for pleadings from the Court.[20]

Rule 2.1 requires an affidavit demonstrating compliance with publication requirements. Requirements in respect of an application to set aside a statutory demand are specified in Corporations Rules r 2.4A, including a requirement for a company search to be undertaken no earlier than seven days before the originating process is filed, which must be annexed to the affidavit in support of the order setting aside the statutory demand or filed before or tended at the hearing of the application.

Rule 2.8 requires the notice of certain applications be given to the Australian Securities

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[16] *Access Services Group Pty Ltd v McLoughlin* [2006] NSWSC 532; (2006) 57 ACSR 725; *Connectland Pty Ltd v Porthaven Pty Ltd* [2011] NSWSC 616 at [19]; *Re Homeward Bound Export Cherry Project Pty Ltd* [2012] NSWSC 764, leave to appeal refused on a different point [2012] NSWCA 447.
[17] *Corporations Act*, ss 467A and 1322; *JSBG Developments Pty Ltd v Kozlowski* [2009] NSWSC 1128 at [21]-[30]; *Re TQC International Pty Ltd* [2010] NSWSC 1260; *Connectland Pty Ltd v Porthaven Pty Ltd* above at [19]; *D B Mahaffy & Associates Pty Ltd v Mahaffey* [2011] NSWSC 673 at [32]-[34]; *Re D B Mahaffy & Associates Pty Ltd* [2012] NSWSC 776 at [3].
[18] Corporations Rules r 2 .2.
[19] *Edenden v Bignell* [2008] NSWSC 666.
[20] *Wily v King* [2010] NSWSC 352

and Investments Commission. For example, notice must be given to ASIC of any application for the release of a liquidator of a company and the deregistration of the company under s 480 of the *Corporations Act*, the stay or termination of a winding up under s 482 of the *Corporations Act,* an inquiry into the conduct of a liquidator under s 536 of the *Corporations Act* or for or relief from liability for contravention of a civil penalty provision under s 1317S(2) and (4)-(5) of the *Corporations Act*. That rule is important, because it recognises that ASIC may have an interest in, and seek to be heard in, the specified applications, and the Court may not be prepared to determine such an application until such notice has been given.

Rule 2.13 allows an application for leave to be heard in Corporations proceedings, as an alternative to being joined as party to the proceedings under UCPR. A party who is heard in the proceedings, rather than being joined as party to them, is less likely to be the subject of an adverse costs order in the proceedings, but is equally less likely to recover its costs of attendance. In *Re Pan Pharmaceuticals Ltd*; *Selim v McGrath* [2004] NSWSC 129; (2004) ACSR 681 at [20], Barrett J observed that the Court has power to make an order to a party to proceedings in favour of non-parties, but a person who is granted leave to be heard without becoming party under r 2.13(1) chooses a course that involves limited costs exposure to it and can have little expectation of being awarded costs, and that such an award, if appropriate, would be "extraordinary and exceptional" and require "some very special factor outside the ordinary and expected course of events and in gendering a justifiable expectation of compensation in the mind of the non-party". On the other hand, in *Re HIH Casualty and General Insurance Ltd* [2006] NSWSC 6, Barrett J observed that parties heard under r 2.13 made separate submissions that where highly relevant to the task of the Court in reaching its decision and special and unusual circumstances therefore warranted a costs order in the particular circumstances, although his Honour considered that only one set of costs should be ordered in the particular circumstances.

Division 5 of the Corporations Rules in turn deals with winding up proceedings, including oppression proceedings where a winding up order is sought. Rule 5.2 specifies the content of an affidavit accompanying a statutory demand, which must be in Form 7 specified by the Corporations Rules and state the matters specified in that form. Some of those matters are of particular importance, such as the statement by the deponent that there is no genuine dispute as to the existence or amount of the debt and a failure to comply with those requirements may lead to a statutory demand being set aside. Rule 5.4 specifies the requirements of an affidavit in support of a winding up application and rule 5.5 deals with liquidators' consent to appointment, which must be in accordance with the specified Form 8. Rule 5.6 deals with publication of winding up applications. Amendments made by the Corporations Legislation Amendment Regulations 2012 (No 1) (Cth) provide for the publication of external administration notices on a website maintained by the Australian Securities & Investments Commission, consequential on the *Corporations Amendment (Phoenixing and Other Measures) Act* 2012 (Cth). A person is taken to have complied with the requirement to publish that notice in the prescribed manner if he or she electronically lodges it with ASIC for publication by ASIC.

Division 11 of the Corporations Rules deals with examinations and orders made under Part 5.9 of the *Corporations Act*. Rule 11.3 deals with the form of application for an

examination summons and the affidavit evidence which is required in support of such application. Rule 11.5 deals with applications to discharge examination summonses. Rule 11.10 deals with the steps that the Court may take where there is, inter alia, a failure to attend that such an examination. I will deal below with some examples of insolvency applications brought in the Corporations List.

Transfer of shares by a deed administrator

Section 444GA of the *Corporations Act* permits a deed administrator to transfer shares in a company that is subject to a deed of company arrangement with the consent of the owner of those shares, or with the Court's leave, and provides that the Court may only grant such leave if it is satisfied that the transfer would not "unfairly prejudice" the interests of members of the company. The authorities indicate that whether there is prejudice, and unfair prejudice, to shareholders is to be determined, inter alia, by reference to whether the shares would have value in a liquidation of the company.[21] In *Re Mirabela Nickel Ltd (subject to deed of company arrangement)* [2014] NSWSC 836, which was an uncontested application under this section relating to shares in a listed company, the Supreme Court of New South Wales similarly held that the question of unfair prejudice depended on the value of the shares in a liquidation scenario, at least if winding up was a likely or necessary consequence of the transfer of shares not being approved, and that members did not suffer prejudice if the shares would have no residual value and the members were unlikely to receive a distribution in a winding up.

In *Re Nexus Energy Limited (subject to deed of company arrangement)* (2015) 105 ACSR 246; [2014] NSWSC 1910,[22] the Court determined a second case involving shares in a listed company, where that application was opposed by shareholders. By way of background, Nexus Energy Limited had fallen into financial difficulty, and a subsidiary of Seven Group Holdings ("SGH") proposed a scheme of arrangement which provided for the acquisition of shares in Nexus Energy at 2¢ per share, which did not achieve the necessary majority to proceed. Another subsidiary of SGH provided bridging finance to Nexus Energy in connection with that proposed scheme of arrangement and interests associated with SGH also acquired the senior debt of Nexus Energy and more than two-thirds of unsecured notes issued by Nexus Energy. Nexus Energy was then placed in administration by its directors after the scheme of arrangement was not approved. The administrators solicited proposals to acquire its assets and a subsidiary of SGH proposed a deed of company arrangement that provided for repayment of the senior debt (owed to its associated entity) in full, payment of $30m to settle a third party litigation claim, payment of 74.5¢ in the dollar for unsecured noteholders and payment of unsecured creditors in full through a creditors' trust, subject to the Court granting leave under s 444GA for the transfer of shares in Nexus Energy to that subsidiary and relief from the applicable takeover provisions under Chapter 6 given by the ASIC. The decision in Nexus involved the additional complexity that, although the listed parent company was subject to the deed of company arrangement, the financing arrangements ensured the

[21] *Weaver v Noble Resources Ltd* (2010) 41 WAR 301; (2010) 79 ACSR 237; [2010] WASC 182.
[22] For commentary, see P Pan, "Unfair prejudice and value breaks in corporate insolvency" (2015) *Insolvency law Bulletin* 58.

continued solvency of the operating subsidiaries, at least while those arrangements were in place.

The trial judge accepted expert evidence led by the deed administrators that Nexus Energy's liabilities substantially exceeded its assets and its shares had no value. The trial judge did not accept that it was sufficient to establish value in the shares, or prejudice to shareholders by an order for their transfer, that SGH might make a more favourable offer if the application under s 444GA of the *Corporations Act* was refused, where it was at least equally possible that a receiver would then be appointed and a forced sale of the company's assets would occur, with no recoveries for shareholders and a substantial loss of value for creditors. The trial judge also held that any loss of opportunity by the shareholders to require SGH to negotiate with them or decline to transfer their shares unless their expectations were met was not prejudice or unfair prejudice for the purposes of the section. The transfer of the shares was therefore approved.

That decision was in turn referred to by Sifris J in *Re 3GS Holdings Pty Ltd (subject to DOCA)* [2015] VSC 145 where his Honour noted (at [14]) that the relevant question was whether the shares to be transferred had a residual value if the transfer was not approved and (at [22]) that no unfair prejudice to shareholders arose from a transfer of shares to a third party if it was unlikely that those shares would support a dividend to shareholders or contributories in any scenario.

Form of affidavit verifying a creditor's statutory demand

Section 459E of the *Corporations Act* provides that a statutory demand may be served on a company relating to a debt or debts that is or are due and payable, the total amount of which is at least the statutory minimum. Unless the debt to which a statutory demand relates is a judgment debt, the demand must be accompanied by an affidavit that verifies that the debt is due and payable by the company and which complies with the Harmonised Corporations Rules of the State Supreme Courts and the Federal Court of Australia. In *Kisimul Holdings Pty Ltd v Clear Position Pty Ltd* [2014] NSWCA 262, the Court of Appeal of the Supreme Court of New South Wales took the same approach as the Court of Appeal of the Western Australian Supreme Court in *Wildtown Holdings Pty Ltd v Rural Traders Co Ltd* (2002) 172 FLR 35; [2002] WASCA 196 and held that the omission from an affidavit verifying a creditor's statutory demand, of a statement that the deponent believed there was no genuine dispute about the existence or amount of the debt, constituted some other reason why the demand should be set aside for the purposes of s 459J(1)(b) of the *Corporations Act*. Barrett JA (with whom Beazley P and Gleeson JA agreed) emphasised the importance of the requirement for such a statement in directing the creditor's attention to the requirement that only an undisputed debt should be made the subject of a statutory demand, as well as informing the company served with the demand of the creditor's belief that the debt was undisputed.

Applications to set aside statutory demands

A company may apply to the Court for an order setting aside a statutory demand served on it, but only within 21 days after the demand is served.[23] The requirement that an application to set aside a statutory demand be brought within 21 days after service of the demand is not qualified by s 1322, and the Court has no power to extend the time for such an application under that section or validate defective service of an application or affidavit in support outside the 21-day period.[24] It is not sufficient for such an affidavit to merely assert the existence of a dispute or offsetting claim, although it is also not necessary to lead all the evidence supporting that claim in admissible form.[25]

Points are frequently taken in applications to set aside a statutory demand as to whether the initial affidavit filed in support of the application raised the particular point on which the applicant relied. The principle has often been expressed in terms that the only grounds of opposition which may be relied on in an application to set aside a statutory demand are those identified in the affidavit supporting that application filed within the 21 day period under s 459G of the *Corporations Act*.[26] The strictness of that approach has been qualified at least to the extent that the initial affidavit will sufficiently raise a dispute if that ground is raised by a necessary or reasonably available inference, including from documents exhibited to the initial affidavit.[27] The better approach may be to treat this issue as raising a fact-specific inquiry as to whether the affidavit in support of the application to set aside the demand in fact supports the application, and whether, expressly or by reasonably available inference, the grounds of challenge of the statutory demand are sufficiently identified in the affidavit.[28]

The question whether a genuine dispute is established, so as to warrant setting aside a statutory demand under s 459H of the *Corporations Act*, raises issues that are, in principle, relatively straightforward and in practice often very difficult. The applicable test is well-known. In *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785, McClelland CJ in Eq observed (at 787) that the expression "genuine dispute" used in s 459H of the *Corporations Act*:

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[23] *Corporations Act* s 459G.

[24] *David Grant & Co Pty Ltd (rec apptd) v Westpac Banking Corp* (1995) 184 CLR 265; 18 ACSR 225 at 234; *Rochester Communications Group Pty Ltd v Lader Pty Ltd* (1997) 143 ALR 648; 23 ACSR 380; *Austar Finance Group Pty Ltd v Campbell* [2007] NSWSC 1493; (2007) 215 FLR 464; 25 ACLC 1834.

[25] *Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* (1996) 70 FCR 452; 21 ACSR 581 at 587.

[26] *Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* above; see also *Energy Equity Corporation Ltd v Sinedie Pty Ltd* [2001] WASCA 419; (2001) 166 FLR 179; *King Furniture Australia Pty Ltd v Higgs* [2011] NSWSC 234; *Kay Investment Holdings Pty Ltd v North East Developments Pty Ltd (in liq)* [2011] NSWSC 1121; (2011) 85 ASCR 610.

[27] *POS Media Online Ltd v B Family Pty Ltd* [2003] NSWSC 147; (2003) 21 ACLC 533; *Hansmar Investments Pty Ltd v Perpetual Trustee Co Ltd* [2007] NSWSC 103; (2007) 61 ACSR 321; *Saferack Pty Ltd v Marketing Heads Australia Pty Ltd* [2007] NSWSC 1317.

[28] *Financial Solutions Australasia Pty Ltd v Predella Pty Ltd* [2002] WASCA 51; (2002) 26 WAR 306; 167 FLR 106 at 115; *Hopetoun Kembla Investments Pty Ltd v JPR Legal Pty Ltd* [2011] NSWSC 1343; 87 ACSR 1 at [36]; *Infratel Networks Pty Ltd v Gundry's Telco and Rigging Pty Ltd* [2012] NSWCA 365; (2012) 92 ACSR 27 at [27]ff.

> "… connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the 'serious question to be tried' criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean that the Court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit 'however equivocal, lacking in precision, inconsistent with uncontested contemporaneous documents or other statements by the same deponent, or inherently improbable in itself it may be' not having 'sufficient prima facie plausibility to merit further investigation as to [its] truth ..."

His Honour also pointed to the clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving such a dispute.

In *Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporises Pty Ltd* (1994) 13 ACSR 37 at 39, Lockhart J in turn observed that:

> "[T]he Court will not examine the merits of the dispute other than to see if there is in fact a genuine dispute. The notion of a 'genuine dispute' in this context suggests to me that the Court must be satisfied that there is a dispute that is not plainly vexatious or frivolous. It must be satisfied that there is a claim that may have some substance."

In *John Holland Construction & Engineering Pty Ltd v Kilpatrick Green Pty Ltd* (1994) 14 ACSR 250 at 253, Young J similarly observed that "[s]omething more than mere assertion is required because if that were not so, then anyone could merely say that it did not owe a debt". In *Solarite Air Conditioning Pty Ltd v York International Australia Pty Ltd* [2002] NSWSC 411 at [23], Barrett J observed that:

> "Once the company shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The Court does not engage in any form of balancing exercise between the strengths of competing contentions. If it sees any factor that, on rational grounds, indicates an arguable case on the part of the company, it must find that a genuine dispute exists, even where any case apparently available to be advanced against the company seems stronger."

In *Offshore and Ocean Engineering v Greenwich Contractors* [2012] NSWSC 889, McDougall J summarised the position at [7] as that:

> "The threshold that the recipient of the demand must satisfy is not strict. Nonetheless, something more than mere assertion is required. The Court is required to be satisfied that there is a dispute that is not plainly vexatious or frivolous, or that there is a claim (either as to the existence of the debtor as to some offsetting claim) that may have substance."

The Court of Appeal delivered an important decision in respect of the test for setting aside a creditor's statutory demand by reason of a genuine dispute or offsetting claim in *Britten-Norman Pty Ltd v Analysis and Technology Australia Pty Ltd* (2013) 85 NSWLR

601; [2013] NSWCA 344. That decision refers to well-established authorities but is also receiving significant attention in recent cases.[29] The Court of Appeal there noted at [30] that:

> "It is settled law that s 459H requires the court to be satisfied that there is a 'serious question to be tried': see *Scanhill v Century 21 Australasia* at 467, or 'an issue deserving of a hearing' as to whether the company has such a claim against the creditor: see *Chase Manhattan Bank Australia Ltd v Oscty Pty Ltd* [1995] FCA 1208; 17 ACSR 128 at [42] per Lindgren J; *Eumina Investments Pty Ltd v Westpac Banking Corp* [1998] FCA 824 ; 84 FCR 454 per Emmett J (as his Honour then was). The claim must be made in good faith: *Macleay Nominees v Belle Property East Pty Ltd*. In that case, Palmer J observed, at [18], that good faith, in this context, meant that the offsetting claim was arguable on the basis of facts that were asserted 'with sufficient particularity to enable the court to determine that the claim is not fanciful'."

The Court of Appeal also observed (at [36]) that there must, relevantly, be evidence that satisfies the Court that there is a "serious question to be tried" or "an issue deserving of a hearing" or a "plausible contention requiring investigation" of the existence of an offsetting claim and that:

> "… evidence sufficient to satisfy this test, given the time period in which the affidavit must be filed, cannot and need not conclusively prove the claim or otherwise be incontrovertible or substantially non-contestable."

The Court of Appeal also observed (at [46]) that:

> "In determining whether there is evidence of a genuine dispute as to the debt, or that there is an offsetting claim, except in extreme cases, the Court is not concerned to engage in an inquiry as to the credit of the deponent of the affidavit filed in support of the application."

At the same time, the Court of Appeal referred to *Eyota Pty Ltd v Hanave Pty Ltd* above and recognised that the Court is not required to accept uncritically every statement in an affidavit, where it is inconsistent with undisputed contemporary documents, inherently improbable, does not have sufficient prima facie plausibility to merit further investigation or is an assertion of facts unsupported by evidence. The Court of Appeal summarised the position (at [47]) as being that the Court's role is:

> "to determine whether there was plausible evidence to establish the existence of a genuine dispute [or offsetting claim], not whether the evidence was disputed or even likely to be accepted on a final hearing of any such claim."

The Court of Appeal did not accept that inconsistent contemporaneous documents were sufficient to displace an offsetting claim, notwithstanding that they might pose "difficulties for the ultimate proof of the claim" (at [70]), and gave little weight (at [80]) to the absence

[29] See, for example, *Re AP & HR Investments Pty Ltd* [2013] NSWSC 1989; *Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd (No 3)* [2014] WASCA 132; (2014) 46 WAR 483; *Hallinan & Co Pty Ltd v A&B Cotton Pty Ltd* [2014] QSC 112; *Re Diveva Pty Limited* [2015] NSWSC 509; *Re Sinadios Haulage Pty Ltd* [2015] NSWSC 596; *Re Tuffrock Pty Ltd* [2015] NSWSC 738; and for commentary see M Bianca & J Hidayat, "Requirements Eased to Set Aside Statutory Demands" (2014) 52(3) *LSJ* 44.

of documents that might support a claim for loss of profit, although it held that an offsetting claim for loss of profits was not established in that case where essential integers in the calculation of lost profits had not been established.

The decision in *Britten-Norman* will be of particular importance where, for example, a director or officer of the company on which a demand was served leads affidavit evidence, in support of an application to set aside the demand, alleging an oral representation by the creditor that might support a genuine dispute or offsetting claim. On the other hand, in *Re Diveva Pty Limited* [2015] NSWSC 509 at [26], I observed that:

> "I do not understand the Court of Appeal's approach in *Britten-Norman* above to require the Court to eschew any evaluative exercise as to whether there is a plausible basis for an offsetting claim, where such an evaluation is contemplated by the earlier cases to which they refer, and seems to me to be necessarily required by any determination of whether there is a serious question to be tried, an issue deserving of a hearing, or a plausible contention requiring investigation."

It has historically been the exception, rather than the rule, for cross-examination to be permitted in applications to set aside a statutory demand.[30] In *Britten-Norman*, the Court of Appeal also gave weight to the absence of cross-examination to challenge the evidence led in support of the offsetting claim. As a result, Courts at first instance may now more readily permit at least limited cross-examination in genuine dispute and offsetting claim cases than had previously been the case: *Re Diveva Pty Ltd* [2015] NSWSC 794.

Termination of a winding up

Applications to terminate a winding up under s 482 of the *Corporations Act* are not uncommon and meet with mixed success. That section provides that, at any time during a company's winding up, the Court may make an order, inter alia, staying the winding up indefinitely or terminating the winding up on the day specified in the order. Section 482(2A) specifies certain matters that the Court must consider where an application under that section is made in relation to a company that is subject to a deed of company arrangement. In particular, where an application to terminate a winding up is made in relation to a company subject to a deed of company arrangement, the Court must have regard, inter alia, to whether the deed of company arrangement is likely to result in the company becoming or remaining insolvent.

Generally, the Court will not terminate a winding up unless a company will have additional financial strength and stability to provide confidence that it can continue without an appreciable risk of returning to liquidation.[31] The Courts have on

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[30] *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* [1994] 2 VR 290 at 292-293; (1993) 11 ACSR 362; *Edge Technology Pty Ltd v Lite-On Technology Corporation* [2002] NSWSC 471; (2000) 34 ACSR 301 at [45]; *Fitness First Australia Pty Ltd v Dubow* [2011] NSWSC 531; *Montage Group Pty Ltd v Wong* [2011] NSWSC 726.

[31] *Re Data Homes Pty Ltd (in liq)* [1972] 2 NSWLR 22 at 27; *Leveraged Equities Ltd v Hilldale Australia Pty Ltd* [2008] NSWSC 190; (2008) 26 ACLC 182; *Re SNL Group Pty Ltd (in liq)* [2010] NSWSC 797 at [24]; *Re Pine Forests of Australia (Canberra) Pty Ltd* [2010] NSWSC 1127 at [3].

occasion been prepared to accept undertakings in respect of steps to be taken to restore a company's solvency, such as capitalisation of loans and the repayment of debts.[32] There are other cases where the Courts have required those steps to be completed prior to an order being made to terminate the winding up.[33] Other relevant factors in an application to terminate a winding up under this section include the interests of the company's creditors, including the interests of the liquidator, particularly with regard to costs; the interests of contributories and the interests of "the public", including the public interest in matters of commercial morality, and the public interest that insolvent companies should be wound up.[34] For example, an application for termination of a winding up was successful in *Re Plaza West Pty Ltd (in liq) (subject to deed of company arrangement)* [2013] NSWSC 168 where significant steps had been taken to address the company's debts and a cashflow analysis supported by expert evidence indicated that the company was likely to be able to meet its future debts as and when they fell due. On the other hand, an application that was not opposed by existing creditors nonetheless failed in *Re 311 Hume Highway Fund Pty Ltd (in liq)* [2013] NSWSC 465, where the Court was not satisfied as to, inter alia, the company's ability to meet future debts if the winding up was terminated.

Extension of time for proceedings brought by a liquidator under s 588FF of the Corporations Act

Section 588FF of the *Corporations* Act specifies the orders that a court may make if a transaction is voidable under s 588FE of the *Corporations* Act, as an insolvent transaction which is an unfair preference (within the scope of s 588FA), an uncommercial transaction of the company (within the scope of s 588FB), an unfair loan to the company (within the scope of s 588FD) or an unreasonable director-related transaction (within the meaning of s 588FDA). An application under this section may be made during the period beginning on the relation-back day (as defined in s 9) and ending on the later of 3 years after the relation-back day or 12 months after the first appointment of a liquidator in relation to the winding up of the company (s 588FF(3)(a)) or within such longer period as the court orders on an application by the liquidator brought within that period (s 588FF(3)(b)).[35]

A power to make "shelf orders", which extend the time for a liquidator to bring proceedings in relation to voidable transactions that are not identified at the relevant time, has been

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[32] *GIO Workers Compensation (NSW) Ltd v Advance International (Aust) Pty Ltd* [2002] NSWSC 261; *Brolrik Pty Ltd v Sambah Holdings Pty Ltd* [2001] NSWSC 1171; (2001) 40 ACSR 361; *Deputy Commissioner of Taxation, Re Directcorp Pty Ltd (in liq) v Directcorp Pty Ltd* [2006] FCA 1020; (2006) 58 ACSR 398.

[33] *Owners Strata Plan 70294 v LNL Global Enterprises Pty Ltd* [2006] NSWSC 1386; (2006) 60 ACSR 646; *Re SNL Group Pty Ltd (in liq)* above.

[34] *Mercy & Sons Pty Ltd v Wanari Pty Ltd* [2000] NSWSC 756; (2000) 157 FLR 107; (2000) 35 ACSR 70, *Re Nardell Coal Corporation Pty Ltd* [2004] NSWSC 281; (2004) 49 ACSR 110; *Vero Workers Compensation (NSW) Ltd v Ferretti Pty Ltd* [2006] NSWSC 292; (2006) 57 ACSR 103 at [17].

[35] *BP Australia Ltd v Brown* (2003) 58 NSWLR 322; 46 ACSR 677; [2003] NSWCA 216; *Tolcher v Capital Finance Australia Ltd* (2005) 143 FCR 300; 52 ACSR 328; [2005] FCA 108; *Australian Securities and Investments Commission v Karl Suleman Enterprizes Pty Ltd (in liq)* (2004) 52 ACSR 103; [2004] NSWSC 1244.

recognised at least since *BP Australia Ltd v Brown* (2003) 58 NSWLR 322; (2003) 46 ACSR 677; [2003] NSWCA 216. The existence of that power was challenged in one of several cases arising out of the liquidation of Octaviar Limited and Octaviar Administration Limited. In that case, the liquidators of two companies in the Octaviar Group had sought a "shelf order" that the time for making applications in respect of those companies under s 588FF(1) of the *Corporations Act* be extended. They had not given notice to the Fortress parties of the application, where they were not then aware of the possibility of a claim against them. The Fortress parties sought to vary or set aside the shelf order so far as it applied to them. They were unsuccessful at first instance and appealed from that decision, contending that the Court of Appeal's earlier decision in *BP v Brown* should be overruled. In *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2014) 308 ALR 166; 99 ACSR 312; [2014] NSWCA 148, the Court of Appeal of the Supreme Court of New South Wales (constituted by a five judge bench) followed *BP Australia Ltd v Brown* above in upholding the Court's power to make an extension order under s 588FF(3)(b) that does not specifically refer to named parties or transactions in extending the time for the commencement of proceedings under s 588FF(1) of the *Corporations Act*. Bathurst CJ (with whom Beazley P, Macfarlan, Barrett and Gleeson JJA agreed) held that the decision in *BP v Brown* was not plainly wrong and should not be overruled and that, where a party is not a target at the time a shelf order is made, the court has a discretion whether or not to set aside the shelf order as against that party.

The High Court unanimously upheld that approach on appeal in *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 317 ALR 421; (2015) 89 ALJR 425; [2015] HCA 10; BC201501284. The Court referred to an observation of Spigelman CJ *in BP Australia Ltd v Brown* above that, where a liquidator is still investigating the identity of recipients of benefits under voidable transactions and cannot identify the transactions to be targeted for the Court, the power "should be broad enough to allow … for an order granting an extension of time in general terms" and observed (at [8]) that that view:

> "involved a balancing of the requirements of commercial certainty on the part of those who had past dealings with the Corporation against the conflicting interest of the creditors of the company."

The Court reviewed the legislative history of s 588FF and noted (at [24]) that the function of s 588FF(3)(b) was "to confer a discretion on the Court to mitigate, in an appropriate case, the rigors of the [3 year] time limits". The Court held (at [27]) that the availability of shelf orders was open on the construction of the section, was consistent with the evident purpose of the section, and was supported by the re-enactment of the section in its existing form after the Court of Appeal had decided *BP Australia Ltd v Brown* above. The availability to make such orders has therefore now been confirmed.

The interaction between s 588FF and the Court's procedural rules, including for extensions of time, was considered by the High Court of Australia in another decision arising from the Octaviar liquidation, *Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2015) 317 ALR 301; (2015) 89 ALJR 401; [2015] HCA 8. The liquidator of Octaviar Limited had there initially obtained an extension of the three year period specified in s 588FF(3) to bring recovery proceedings, for a period of six months, and then applied to

the Court, within that extended period, for a second extension of six months under s 588FF(3)(b) or a variation of that extension under r 36.16(2)(b) of the Uniform Civil Procedure Rules, which allows the Court to vary an order made in the absence of a party including, perhaps oddly, on the application of the party who had been present and made that application.

On the first application, Ward J (as her Honour then was) held that a second extension of time was not available under s 588FF(3)(b) but varied the period of that extension under UCPR r 36.16(2)(b). The liquidator then commenced preference proceedings against several parties within the further extended six month period and they applied to set aside the order made by Ward J. That application raised questions as to the application of s 79(1) of the *Judiciary Act* 1903 (Cth), which provides that the laws of a State or Territory, including relating to procedure, apply to a Court that is exercising Federal jurisdiction in that State or Territory, except as otherwise provided by the constitution or the laws of the Commonwealth, and as to the extent to which s 588FF of the *Corporations Act* operated as a code so as to exclude procedural rules of the State or Territory. The application to set aside the orders made by Ward J was unsuccessful at first instance and, by majority, in the Court of Appeal. On appeal, the High Court emphasised that the commencement of preference proceedings within the time limit under s 588FF(3), as extended under s 588FF(3)(b) was a precondition to the Court's jurisdiction under s 588FF; approved the observation of Spigelman CJ in *BP v Brown* above that the section contemplated a single determinate extension of time; and held that s 588FF "otherwise provided" for the purposes of s 79 of the *Judiciary Act*, so that an extension of time under that section could not be supplemented or varied by procedural rules of the Court in which the application has been brought.

In a third decision, in *Fletcher v Anderson* (2014) 293 FLR 269; (2014) 103 ACSR 236; [2014] NSWCA 450, the Court of Appeal considered the position in respect of preference claims against the Commissioner of Taxation under s 588FA of the *Corporations Act* and consequential claims to indemnity under s 588FGA of the *Corporations Act*. As I noted above, Ward J had made a shelf order under s 588FF(3) of the *Corporations Act* extending the time for proceedings to be brought in respect of preference and other transactions on the liquidator's application. The liquidator subsequently brought proceedings against the Commissioner of Taxation alleging that a number of payments made to it were unfair preferences under s 588FA of the *Corporations Act* and insolvent transactions under s 588FC of the *Act* and claiming orders under s 588FF of the *Act*. Section 588FGA(2) of the *Act* in turn obliged each director of the company, at the time the relevant payment was made, to indemnify the Commissioner in respect of loss or damage resulting from an order under s 588FF and s 588FGA(4) allowed the Court to make orders to give effect to that right of indemnity.

On an application to set aside the extension order made by Ward J, Young AJA held that, where a liquidator was contemplating proceedings against the Commissioner of Taxation, the directors who would become subject to the statutory indemnity were directly affected by the proposed action and should have been given notice of the application to extend time, and set aside the order extending time. The Court of Appeal observed that s 588FGA(2) of the *Corporations Act* creates a statutory liability on the part of the director,

in respect of the claim against the Commissioner of Taxation, whether or not the Commissioner ultimately brings proceedings to enforce that statutory liability, and also held that directors were immediately affected by the extension order made under s 588FF of the *Corporations Act* and should have been given notice of the application and an opportunity to be heard. However, the result was not that the extension order should necessarily be set aside, but instead that they should be allowed a further opportunity to be heard as to the question whether that order should have been made.

Personal Property Securities legislation

The *Personal Property Securities (Corporations and Other Amendments) Act* 2010 (Cth) introduced Pt 1.2 Div 6A into the *Corporations Act* dealing with security interests; repealed Ch 2K of the *Corporations Act* (dealing with registration of charges) with effect from 30 January 2012; and amended Ch 5 of the *Corporations Act*, to reflect the new concepts introduced by the *Personal Property Securities Act* 2009 (Cth). The operation of s 588FM, which allows an extension of time for registration of a security interest on grounds broadly corresponding to the former s 266, was considered in *Re Barclays Bank plc* [2012] NSWSC 1095,[36] *Re Cardinia Nominees Pty Ltd* [2013] NSWSC 32[37] and *Re Black Opal IP Pty Ltd (subject to Deed of Company Arrangement)* [2013] NSWSC 1225, which treat the jurisdiction to make an order under this section as established by, inter alia, "inadvertence" including the mistake of a secured creditor or its legal advisers, and recognise factors as relevant to the grant of relief as including the length of the delay and the potential impact of preventing a vesting of the security registered outside time on other creditors. A dispute as to priorities, raising issues under the *Personal Property Securities Act* rather than the *Corporations Act*, was determined by Brereton J in *Re Maiden Civil (P&E) Pty Ltd; Albarran v Queensland Excavation Services Pty Ltd* [2013] NSWSC 852.

Conclusion

I have reviewed several aspects of the operation of the Corporations List in insolvency matters and with some of the issues typically arising in common insolvency applications in the list and some recent cases in that regard. It is, of course, to be hoped and expected that the Corporations List provides a useful service to litigants with matters involving the *Corporations Act* and associated legislation, with judges with specialist expertise and access to a relatively high level of case management where needed.

[36] For commentary, see D Brown, "Court Cuts Slack for Late Registrations in Early Days of PPSA" (2012) 13(5) *INSLB* 111.
[37] For commentary, see H Kincaid & F Assaf, "Navigating s 588FM Orders – Re Cardinia Nominees" (2013) *BCLB* [169].