Commercial Equity Seminar 26 April 2016

Practice and procedure in the Corporations List

Justice Ashley Black

Supreme Court of New South Wales

I will deal, by way of refresher, with several familiar aspects of insolvency practice in the Corporations List. I will also touch upon several categories of cases in the Corporations List, particularly some matters we have decided over the last year or so, before Brereton J expands on aspects of and pitfalls in those applications.

The structure of the Corporations List

I first address several practical matters, at the risk of noting the obvious:

- Practice Note SC Eq 4 deals with practice in the Corporations List. 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. Matters suitable for short hearings (usually less than two hours) can also be heard in that way. Consent orders can be made in chambers in the previous week to avoid the cost of an appearance.

- You can 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.[1] This is commonly done and such requests are readily accommodated.

- Urgent corporations matters, including applications for short service, 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.

Particular applications

I will now turn to a range of applications we are seeing in the List, then to the *Insolvency*

[1] Practice Note SC Eq 4 paragraph 13.

Law Reform Act 2016 (Cth) and, if time permits, to some other procedural aspects of applications in the List.

Derivative actions

We are continuing to see a range of applications for leave to bring derivative actions in the Court's inherent jurisdiction where a company is in liquidation and under ss 236–237 of the *Corporations Act* where the company is not in liquidation. An application on both bases was made in *Re Sundara Pty Ltd* [2015] NSWSC 1694 and failed (in respect of several claims) because a serious question to be tried was not established and also because it was not in the company's best interests that leave be granted by reason of issues as to the adequacy of an indemnity offered by the applicant. The interaction between valuation issues arising in a compulsory acquisition of minority shares under Ch 6A of the *Corporations Act* and claims made in derivative action was considered by Brereton J in *Re Australian Water Holdings Pty Ltd* [2016] NSWSC 254. An application for leave succeeded in *Rinfort Pty Ltd v Arianna Holdings Pty Ltd* [2016] NSWSC 551 where a director and shareholder sought leave, nunc pro tunc, to continue an application to set aside a statutory demand which he had commenced in the company's name.

Schemes of arrangement

Brereton J will address the range of issues arising in recent schemes of arrangement.

Administrations and deeds of company arrangement

The question whether a stay of proceedings against a company in administration under s 440D of the *Corporations Act* extended to an arbitration was considered by Brereton J in *Re THO Services Ltd* [2016] NSWSC 509. His Honour noted that the use of the phrase "proceeding in a court" in s 440D (and a similar phrase in s 471B in respect of a court-ordered winding up) limited the scope of the stay and that earlier decisions had held that the stay under s 440D did not apply to a private arbitration[2], although different language used in s 444E and s 500(2) had the effect that a stay would potentially extend to an arbitration where a company was subject to a deed of company arrangement or in voluntary winding up. His Honour also noted (at [21]) that:

> "That review of the current legislative situation reveals a situation which is ripe for the attention of an appropriate corporations law reform agency. But it also confirms, in accordance with the decisions of Bergin J and Hammerschlag J to which I have referred, that s 440D does not catch an arbitration."

His Honour held that the Court had power under s 447A of the *Corporations Act* to extend s 440D to stay the particular arbitration and that it was a proper exercise of discretion to do so in that case. The amendments to be made by the *Insolvency Law Reform Act* 2016 do not seem to address this issue.

[2] *Auburn Council v Austin Australia Pty Ltd* [2004] NSWSC 141 (Bergin J, as her Honour then was); *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* [2011] NSWSC 1305; (2011) 285 ALR 207 (Hammerschlag J).

Complex questions as to whether a secured creditor's debt survives a deed of company arrangement that purports to extinguish it, under s 444D(2) of the *Corporations Act*, were considered by the Supreme Court of Western Australia in *Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd* [2014] WASC 89; (2014) 99 ACSR 152 and in this List in *Re Bluenergy Group Ltd (subject to a deed of company arrangement) (admin apptd)* [2015] NSWSC 977; (2015) 107 ACSR 373 (holding that the secured creditor was entitled to rely on its security notwithstanding the deed but could not appoint a second administrator).

There are a continuing run of generally successful applications under s 447A of the *Corporations Act* to extend the convening period for the second meeting of creditors in complex administrations.[3] Orders have also been made under s 447A of the *Corporations Act* to facilitate electronic delivery of communications with creditors, particularly in large administrations where the company and customers dealt with each other in that way.[4]

In *Re Recycling Holdings Pty Ltd* [2015] NSWSC 1016 (Brereton J), an application to terminate a deed of company arrangement failed, although deficiencies in the information provided to creditors were established, on the basis the deed was in creditors' interests. A deed of company arrangement was varied to omit impermissible requirements to release third parties, and remedy an inconsistency between the terms approved by the creditors and the terms of that deed, in *Re Eastmark Holdings Pty Ltd* [2015] NSWSC 1437; (2015) 109 ACSR 116 (Brereton J). In *Tesrol Walsh Bay Pty Ltd (subject to deed of company arrangement)* [2015] NSWSC 374, a deed of company arrangement was terminated under s 445D of the *Corporations Act* where a condition to its termination could not be satisfied and its implementation without that condition being satisfied would have operated unfairly to creditors.

Statutory demands

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 relies.[5] The strictness of this 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.[6] 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

[3] For example, *Re White Motor Corporation (Australia) Pty Ltd* [2015] NSWSC 2008.
[4] *Re BBY Ltd* [2015] NSWSC 974; *Re Ice TV (admin apptd)* [2015] NSWSC 2006.
[5] *Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* (1996) 70 FCR 452; 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.
[6] *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.

inference, the grounds of challenge of the statutory demand are sufficiently identified in the affidavit.[7]

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 straightforward in principle and difficult in practice. 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] NSWCA 344; (2013) 85 NSWLR 601. 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 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* (1994) 12 ACSR 785 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:

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[7] *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; (2011) 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.

> "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."

That decision has been considered in several recent cases.[8]

It has historically been the exception, rather than the rule, for cross-examination to be permitted in applications to set aside a statutory demand.[9] However, in *Britten-Norman*, the Court of Appeal gave weight to the absence of cross-examination to challenge the evidence led in support of the offsetting claim. As a result, at least limited cross-examination in genuine dispute and offsetting claim cases may more readily be permitted than had previously been the case.[10]

The balance of recent cases indicate that a genuine dispute cannot be relied on as a basis to set aside a statutory demand arising from registration of an adjudication under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("*SOPA*"), and a challenge to the correctness of the adjudication itself does not establish an offsetting claim.[11] The circumstances in which a discrete offsetting claim, for example for loss arising from deficiencies in the work undertaken, may be relied on to resist a statutory demand based on an adjudication under the SOPA were left open by Brereton J in *Re Douglas Aerospace Pty Ltd* [2015] NSWSC 162 and considered in detail by Robb J in *J Group Constructions Pty Ltd* [2015] NSWSC 1607.[12]

Termination of a winding up

Applications to terminate a winding up under s 482 of the *Corporations Act* are not uncommon and have mixed success. 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.[13] The factors relevant to such an application were usefully summarised by Brereton J in *Re Glass Recycling Pty Ltd* [2014] NSWSC 439, which has been applied in several

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[8] 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; A Black, "Recent developments in Corporations Law", Commercial Law Association of Australia, June Judges Series – 19 June 2015.

[9] *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* [2000] 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.

[10] *Re Diveva Pty Ltd* [2015] NSWSC 794.

[11] *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91; *Re Douglas Aerospace Pty Ltd* [2015] NSWSC 167; *J Group Constructions Pty Ltd* [2015] NSWSC 1607.

[12] For commentary, see S Zarnucki, "Testing the boundaries of the statutory demand procedure" (2015) *Insolvency Law Bulletin* 115.

[13] *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].

subsequent cases.[14] In a successful reinstatement application in *Re We Will Pty Ltd* [2015] NSWSC 2068 at [13], Brereton J observed that:

> "on this type of application, it is insufficient to demonstrate bare solvency through a balance sheet, on which the assets barely exceed the liabilities; and the Court will require to be satisfied not only that for the moment the company is temporarily solvent, but that it can be expected that the company will continue to remain solvent in its future operations for the foreseeable future. That is perhaps more important where the company is going to continue to trade."

Such applications occasionally fail on a first attempt to fail for lack of adequate evidence of solvency, although the application may then be adjourned to allow another attempt or, if dismissed, that dismissal may be stayed to leave open the opportunity for better evidence to be led. An application failed, at least on the evidence initially led, in *Avenue Investment Capital Pty Ltd (in liq)* [2015] NSWSC 1919 (Robb J), where the company's financial statements showed no assets and liabilities, the company's future activities were unclear and there was evidence of potential voidable transactions prior to the winding up. In *Nostalgia Motorcycles Pty Ltd (in liq)* [2015] NSWSC 2036, an application to terminate the winding up of a trading entity was stood over to allow additional evidence of the company's financial position to be led, and succeeded when fuller evidence of that matter was led. In *Re Deccan Holdings Pty Ltd (in liq)* [2016] NSWSC 122, an application to terminate a winding up was dismissed when insufficient evidence of the company's financial position was led, but that dismissal was stayed, and the application succeeded when further evidence of a fuller review of the position was led. One might ask, rhetorically, whether it would be preferable to lead adequate evidence, particularly as to solvency, at the first hearing of the application and avoid the additional costs and delay of multiple attendances.

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 including 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)).[15]

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[14] For example, *Isaacson v Tayeh and Solomons as liquidators of Isaacson Pty Ltd (in liq)* [2014] NSWSC 439; *Avenue Investment Capital Pty Ltd (in liq)* [2015] NSWSC 1919.

[15] *BP Australia Ltd v Brown* [2003] NSWCA 216; (2003) 58 NSWLR 322; 46 ACSR 677; *Tolcher v Capital Finance Australia Ltd* [2005] FCA 108; (2005) 143 FCR 300; 52 ACSR 328; *Australian Securities and*

The 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 recognised at least since *BP Australia Ltd v Brown* [2003] NSWCA 216; (2003) 58 NSWLR 322; (2003) 46 ACSR 677 and was reconfirmed on appeal in *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2015] HCA 10; (2015) 317 ALR 421; (2015) 89 ALJR 425; BC201501284.

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 *Grant Samuel Corporate Finance Pty Ltd v Fletcher* [2015] HCA 8; (2015) 317 ALR 301; (2015) 89 ALJR 401. 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; and held that s 588FF "otherwise provided" for the purposes of s 79 of the *Judiciary Act* 1903 (Cth), 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] NSWCA 450; (2014) 293 FLR 269; (2014) 103 ACSR 236, 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*. 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.

Insolvency Law Reform Act

I should also mention the passage of the *Insolvency Law Reform Act* 2016, which is expected to commence in March 2017.

The *Insolvency Law Reform Act* will repeal a number of sections that are commonly relied on in applications in the Corporations List, including s 479 (exercise and control of a court-appointed liquidator's powers), ss 502–505 (appointment and removal of a liquidator in a voluntary winding up, review of a liquidator's remuneration), s 511 (applications to the Court to have questions determined or powers exercised in a voluntary winding up), s 536 (supervision of liquidators) and ss 600A–600E (Court's powers in respect of resolutions passed at creditors' meetings). There are complex transitional provisions.

Investments Commission v Karl Suleman Enterprizes Pty Ltd (in liq) [2004] NSWSC 1244; (2004) 52 ACSR 103.

Some broadly corresponding powers will be introduced in the Insolvency Practice Schedule (Corporations) contained in proposed Schedule 2 of the *Corporations Act*. Division 45 of the Insolvency Practice Schedule (Corporations) allows the Court specified powers in relation to registered liquidators, including on its own initiative in Court proceedings or on application by the liquidator or ASIC. Division 60 Subdiv B permits an external administrator[16] to claim remuneration specified in a "remuneration determination" made by, inter alia, the Court. The Court can also review an external administrator's remuneration, including ordering repayment of remuneration.

Division 70 Subdiv G allows the Court (and also ASIC) a new power to direct an insolvency practitioner to provide information, including information requested by creditors. The Court retains the power to inquire into an external administration under Div 90 Subdivs B and C. In particular, s 90-15 allows the Court to make such orders as it thinks fit in relation to the external administration of a company. The Court can exercise that power on its own initiative, during proceedings before the Court; or on application by specified persons under s 90-20. Section 90-15(2) gives examples of such orders including:

- an order determining any question arising in the external administration of the company;
- an order that a person cease to be the external administrator of the company;
- an order that another registered liquidator be appointed as the external administrator of the company;
- an order in relation to the costs of an action (including court action) taken by the external administrator of the company or another person in relation to the external administration of the company[17];
- an order in relation to any loss that the company has sustained because of a breach of duty by the external administrator[18]; and
- an order in relation to remuneration, including an order requiring a person to repay to a company, or the creditors of a company, remuneration paid to the person as external administrator of the company.

[16] Div 5, cl 5-20 of the Insolvency Practice Schedule (Corporations) provides that an external administrator is an administrator of a company, the administrator of a deed of company arrangement in respect of the company or the liquidator or provisional liquidator of the company.

[17] Section 90-15(5) provides that an order mentioned under s 90-15(3)(d) in relation to the costs of an action may include an order that the external administrator or another person is personally liable for some or all of those costs; and the external administrator or another person is not entitled to be reimbursed by the company or its creditors in relation to some or all of those costs.

[18] Section 90-15(6) provides that an order mentioned under s 90-15(3)(e) in relation to a loss may include an order that the external administrator is personally liable to make good some or all of the loss; and the external administrator is not entitled to be reimbursed by the company or creditors in relation to the amount made good. This section also does not limit the Court's powers under any other provision of this Act, or under any other law.

Section 90-15(4) specifies matters which the Court may take into account when making orders, namely whether the liquidator has faithfully performed, or is faithfully performing, the liquidator's duties; whether an action or failure to act by the liquidator is in compliance with the *Insolvency Law Reform Act* and the Insolvency Practice Rules; whether an action or failure to act by the liquidator is in compliance with an order of the Court; whether the company or any other person has suffered, or is likely to suffer, loss or damage because of an action or failure to act by the liquidator; and the seriousness of the consequences of any action or failure to act by the liquidator, including the effect of that action or failure to act on public confidence in registered liquidators as a group. Div 100, s 100-5 will allow an external administrator to assign any right to sue conferred on him or her by the *Corporations Act*, but court approval for that assignment is required after any action brought by the external administrator has begun.

Requirements under the Corporations Rules

Proceedings in the Corporations List are governed by the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") generally, but also by the Supreme Court (Corporations) Rules 1999. The Corporations Rules require some differences in procedure from those set out in the UCPR, 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.[19] 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.[20] A judgment in default of filing a defence is only available under the UCPR 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.[21]

Rule 2.8 requires notice of certain applications be given to the Australian Securities 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 relief from liability for contravention of a civil penalty provision under s 1317S(2) and (4)–(5) of the *Corporations Act*.

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 the UCPR. A person who is granted leave to be heard without becoming party under r 2.13(1) has a more limited

[19] Corporations Rules r 2.2.
[20] *Edenden v Bignell* [2008] NSWSC 666.
[21] *Wily v King* [2010] NSWSC 352.

costs exposure but can also have a lesser expectation of being awarded costs.[22]

Other procedural matters

Discovery and notices to produce

Procedures for discovery in the Commercial List and Technology and Construction List, including processes for electronic discovery, also apply in corporations matters.[23] Practice Note SC Eq 11, "Disclosure in the Equity Division" applies to proceedings in the Corporations List, as to proceedings in the Equity Division generally. That Practice Note is to be covered in the Commercial List seminar on 5 May. The Practice Note has been applied to extensive notices to produce, which are functionally equivalent to applications for discovery, by analogy.[24]

Court books

Practice 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.[25] This practice is plainly preferable in more complex matters, although it is not universally adopted in simpler applications in the Corporations List and we tend to take a pragmatic approach. 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 (expressly limited to those that are essential having regard in particular to s 190(3) of the *Evidence Act* 1995) and short outlines of submissions.

Late affidavits

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 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, UCPR r 10.2 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

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[22] *Re Pan Pharmaceuticals Ltd*; *Selim v McGrath* [2004] NSWSC 129; (2004) ACSR 681 at [20]; *Re HIH Casualty and General Insurance Ltd* [2006] NSWSC 6.

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

[24] *Owners Strata Plan SP 69567 v Baseline Constructions Pty Ltd* [2012] NSWSC 502; *Re Mempoll Pty Ltd, Anakin Pty Ltd & Gold Kings (Australia) Pty Ltd* [2012] NSWSC 1057; *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.

[25] Practice Note SC Eq 3 paragraphs 33–36, applied to corporations matters by Practice Note SC Eq 4 paragraph 24.

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: see, for example, *Khan v Khan: Islamic Association Western Suburbs Sydney Inc* [2015] NSWSC 1993 at [20].

Mediation

Part 4 of the *Civil Procedure Act* provides for mediation.[26] 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.[27]

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.

Developments in cross-border insolvency

Part 5.6 Div 9 of the *Corporations Act* provides for cooperation between Australian and foreign courts in external administration matters, which include, broadly, a winding up outside Australia of a body corporate or the insolvency of a body corporate. Section 581(2) of the *Corporations Act* requires the Court to act in aid of, and be auxiliary to, the Courts of prescribed countries that have jurisdiction in external administration matters. That section also permits, but does not require the Court to act in aid of, and be auxiliary to, the Courts of other countries that have jurisdiction in external administration matters. Section 581(3) provides that, where the Court receives a letter of request from a court of a country other than Australia, it may exercise such powers as it could exercise if the matter had arisen in its own jurisdiction. The letter of request process is also available at general law: see, for example, *Re McGrath* [2008] NSWSC 881 at [18]. Part 5.7 of the

[26] 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".
[27] *Idoport Pty Ltd v National Australia Bank* [2001] NSWSC 427; *Higgins v Higgins* [2002] NSWSC 455.

Corporations Act also allows a foreign company that is registered in Australia or carries on business in Australia to be wound up in Australia, even if it has been wound up, dissolved, deregistered or ceased to exist under the laws of the place where it is incorporated.

The *Cross-Border Insolvency Act* 2008 (Cth) also gives effect to the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law (1997), and commenced operation in Australia on 1 July 2008.[28] The Court has jurisdiction to recognise foreign proceedings and cooperate with foreign courts in relation to insolvency proceedings under the Model Law.[29] Article 15 of the Model Law allows a foreign representative to apply to an Australian court for recognition of foreign proceedings in which the foreign representative was appointed. Foreign proceedings are recognised under Article 17 as either a foreign main proceeding or a foreign non-main proceeding. A foreign proceeding is recognised as a foreign main proceeding if it takes place in the state where the debtor has its centre of main interests ("COMI").[30] On the other hand, a foreign proceeding is recognised as a non-main proceeding if it takes place in a state where the debtor has an establishment.[31] Australian courts have determined many applications for recognition of foreign proceedings under Article 17 of the Model Law, as foreign main proceedings or foreign non-main proceedings, which have generally been relatively uncontroversial and successful.[32]

Article 25 of the Model Law provides that in matters referred to in Article 1 (dealing with the scope of its application) the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives. Article 26 of the Model Law provides for cooperation by a trustee or registered liquidator, subject to the court's supervision, to the maximum extent possible with foreign courts or foreign representatives. Cooperation is

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[28] Sections 2 and 6 of the *Cross-Border Insolvency Act* 2008 (Cth). See generally J Martin, "Cross-Border Insolvency and the Common Law" in K E Lindgren (ed), *International Commercial Litigation and Dispute Resolution*" pp 213–223; S Maiden, "A comparative analysis of the use of the UNCITRAL model law on cross-border insolvency in Australia, Great Britain and the United States" (2010) 18 *Insolv LJ* 63; S Atkins & R Mason, "Australia" in LC Ho (ed), *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law*, 3rd ed, 2012, pp 15–53.

[29] Section 10 of the *Cross-Border Insolvency Act* 2008 (Cth).

[30] Article 17.2 of the Model Law. Article 16.3 provides that, in the absence of proof to the contrary, the debtor's registered office or habitual residence, in the case of an individual, is presumed to be the debtor's COMI.

[31] The term "establishment" is defined in Article 2(f) as "any place of operations where the debtor carries on a non-transitory economic activity with human means and goods or services".

[32] *Hur (in his capacity as foreign representative of Samsun Logix Corporation) v Samsun Logix Corporation* [2009] FCA 372 (recognition of South Korean receivership); *Tucker, in the matter of Aero Inventory (UK) Ltd v Aero Inventory (UK) Ltd (No 2)* [2009] FCA 1481; (2009) 77 ACSR 510 (recognition of UK voluntary administration); *Katayama v Japan Airlines Corporation* [2010] FCA 794; (2010) 79 ACSR 286 (recognition of trusteeship for corporate reorganisation); *Akers (as joint foreign representative) v Saad Investments Co Ltd (in official liquidation)* [2010] FCA 1221 (recognition of liquidation in Cayman Islands); *Re Chow Cho Poon (Private Ltd)* [2011] NSWSC 300 (recognition of Singapore liquidation*); Lawrence v Northern Crest Investments Ltd (in liq)* [2011] FCA 672 (recognition of New Zealand liquidation); *Sheahan v Ex Ced Foods* [2011] FCA 692 (recognition of New Zealand liquidation); *Wild (Foreign representative) v Coin Co International PLC (admins apptd)* [2015] FCA 354; O McCoy & J McLeod, "The consequences of the concept of COMI: a refresher on the recent past and a hint at the immediate future" (2015) *Insolvency Law Bulletin* nos 9-10, 125.

available under Articles 25 and 26 without any requirement for recognition of the foreign proceeding. Article 27 lists the types of cooperation authorised by these Articles.

A Practice Note has been adopted in largely common form by the Federal Court of Australia, the Supreme Court of New South Wales and several other Australian Supreme Courts, which recognises that cooperation in a particular case generally occurs within a framework proposed by the parties and approved by the Court and requires the parties have regard to, inter alia, the Global Guidelines for court to court communications in international insolvency cases formulated by the American Law Institute and the International Insolvency Institute ("ALI Guidelines") in formulating a proposed framework for court to court communications. The importance in Australian law of the proposition that cooperation between an Australian court and any foreign court would generally occur within a framework or protocol that had previously been approved by the court, and was known to the parties in the particular proceedings, was recognised in *Parbery; Re Lehman Brothers Australia Ltd* (2011) 285 ALR 476 (Federal Court of Australia, Jacobson J).

A discussion has recently begun, at the initiative of the Chief Justices, between the Court, the Federal Court of Australia and the Supreme Courts of Singapore and Hong Kong as to the possibility of a wider cooperation protocol extending to those jurisdictions, which have not adopted the Model Law.