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May 2013

Insolvency and Presumed Insolvency

The Corporations Act 2001 categorises a winding-up by the court as one of winding-up insolvency (see Pt 5.4) and winding-up on other grounds (see Pt 5.4A).

However, these categories are only relevant to the process of initiating court winding-up. The bulk of the regulation of court liquidation is under the heading of winding-up in Insolvency or by the court (see Pt 5.4B).

A definition of Insolvency is provided by the statute. A person is insolvent if he or she is not able to pay all his or her debts as and when they become due and payable (s 9 and 95A).

Section 95A states a cash flow test rather than a balance sheet test; and solvency under the definition is not to be determined by the application of a rigid rule, but rather is a factual question to be determined in the light of all the circumstances of the case: *Melbase Corporation Pty Ltd v Segenhoe Ltd (1995) 12 ACLC 823*.

An applicant under s 459P for an order that a company be wound up in Insolvency, can only be made in respect of an insolvent company. Furthermore, in respect of some applicants (a contingent or prospective creditor, a contributory, a director, or ASIC) the court will not give leave to make such an application unless there is a prima facie case that the company is insolvent.

But insolvency will be presumed in respect of an application that a company be wound up in insolvency, or indeed any other application that a company be wound up, if during or after three months ending on the day when the application was made (s 459C (2)):

- (a) the company failed (as defined by s 459F) to comply with a statutory demand
- (b) execution or other process issued on judgment, decree or order of an Australian Court in favour of a creditor of the company was returned wholly or partly unsatisfied
- (c) a receiver, or receiver and manager, of property of the company was appointed under a power contained in an instrument relating to a circulating security interest such as property
- (d) an order was made for the appointment of such a receiver, or receiver and manager, for the purpose of enforcing such security interest
- (e) a person entered into possession, or assumed control, of such property for such a purpose, or
- (f) a person was appointed so to enter into possession or assume control (whether as agent for the secured party or for the company).

A presumption for which s 459C (3) provides operates except so far as the contrary is proved purposes of the application.

Finally as always we at Chamberlains SBR are more than welcome to discuss any matter with you or your clients regardless of how trivial it may appear.

*Chamberlains SBR, Chartered Accountants - Specialises in Personal & Corporate
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