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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 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 occasions 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 Corporations Duty Judge 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. There is not a particularly long delay between a matter being ready for hearing and the hearing date: for example, cases of two – three days in the Corporations List which were ready for hearing on Monday 27 May could have been allocated dates in July or August 2013. It can be more of a challenge to allocate additional hearing dates if

[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

matters are not completed within the time initially allocated for the hearing, because other matters will have been allocated hearing dates on the basis that the matter should complete within its allocated hearing time.

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 often hear uncontested and straightforward applications. The Registrar also sits in liquidators' examinations. The delegation of powers to Registrars in respect of Corporations matters has recently been revised and now arises from a delegation made by the Chief Justice on 12 December 2012, underpinned by the *Civil Procedure Act* 2005 (NSW). The delegation provides, for example, for delegation to Registrars of fixing or determining (but not reviewing) the remuneration of administrators and liquidators.[3] Applications for leave to proceed against a company in administration or liquidation[4] are delegated to Registrars, but only where the application is not opposed. These matters are proper for determination for a judge where they are opposed, since they will require consideration, on a prima facie basis, of the merits of the proposed claim and whether there is good reason to depart from the usual procedure proof of debt in the liquidation. Applications to set aside statutory demands[5] are not delegated to Registrars, by contrast with the position in the Federal Court of Australia. While these are relatively common applications, the approach of listing them before a judge reflects the significant consequences of a determination of such applications for the parties; in particular, a failure to set aside a statutory demand in respect of a debt which is contended to be disputed will give rise to a presumption of insolvency and, if the relevant company cannot rebut that presumption, to a winding up order. A Registrar is delegated the power to make winding up orders where a winding up application is not opposed, both on insolvency and on other grounds, but winding up applications which are opposed are heard by a judge.[6]

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

[2] Practice Note SC Eq 4 paragraph 13.
[3] *Corporations Act* ss 425, 449E, 473, 484, 504.
[4] *Corporations Act* ss 440D, 471B, 500(2).
[5] *Corporations Act* ss 459G-459H, 459J, 459L-459N.
[6] *Corporations Act* ss 459A, 459B, 461.

by the Court, or within 48 hours if no direction is made.[7] 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.[8] It is, of course, necessary for a legal representative of the party seeking urgent relief to wait at Court until the record of the proceeding is available, and then accompany the judge's tipstaff to the Registry to file the originating process, pay the filing fee and collect stamped copies of the relevant documents for service.[9]

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.[10]

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. For example, an application for a preliminary injunction restraining a buyback of a company's shares was successful in *Re Wedgetail Asset Management Pty Ltd* (unreported, 14 December 2012). On the other hand, an application for an interlocutory injunction to restrain the holding of a directors' meeting failed in *Re Pioneer Energy Holdings Pty Ltd* [2013] NSWSC 425. The latter decision involved an application brought at about 11 am seeking to restrain a directors' meeting which have been called some two weeks earlier and which was due to take place at 2 pm on that day. The Court noted, as one of several matters relevant to whether the injunction should be granted, the lateness of the application, and referred to the observation of Campbell J in *Capgemini US v*

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[7] UCPR r 25.2.
[8] UCPR r 36.11(2A).
[9] PLG Brereton, "Practice and Procedure before the Duty Judge in Equity", 14 August 2008, pp 7-8.
[10] *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.

Case [2004] NSWSC 674 at [40] 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, including processes for electronic discovery, also apply in Corporations matters.[11] 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 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

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

"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 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, 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.[12]

Conduct of the hearing

Evidence in proceedings in the Corporations List (other than in interlocutory applications) is also to be served on other parties but not filed with the Court until the hearing, and 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.[13] 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 process to be adopted in any case in which expert evidence as to be given, which includes preparation of a statement of issues for expert assistance to the Court; a meeting of experts and preparation of a joint report any separate reports dealing with those matters which the experts cannot agree; and also requires the preparation of a court book containing all current pleadings, all affidavits, reports and paginated documents to be relied on at trial, and service of an outline of submissions, statement of the real issues for determination, a list of authorities, chronology and objections prior to the hearing.

The delivery of a court book and submissions prior to the hearing is of real assistance to a judge because the present practice that affidavits are often served but not filed until the hearing means that they will not be contained in the court file. The delivery of a court book to chambers will assist the judge in familiarising himself or herself with the matters in dispute prior to the hearing. There are different views among judges as to whether objections should be delivered prior to the hearing. One view, which has real force, is that lists of objections provided prior to a hearing tend to encourage a proliferation of objections which might not be pressed if Counsel needed to make them orally at the hearing. The other view, which I personally take, is that it is preferable to have a notice of objections in advance. My practice is to review those objections and indicate preliminary rulings after the affidavits are read, subject to

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

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

submissions that I should take a different view. My experience has been the Counsel do not seek to urge a contrary result for the majority of rulings on objections. (That may indicate only the matter was of little significance, rather that Counsel have any particular view that the preliminary ruling was correct.) Not surprisingly, from time to time Counsel seek to, and succeed in, persuading me to a different position to that indicated in the preliminary rulings.

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.[14]

The Court may also allocate blocks of time, in proceedings in the Corporations List, for examination in chief, cross-examination, re-examination and submissions.[15] 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 from the Court if they intend to induce, or it becomes apparent that

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[14] See, for example, *Re Cancer Care Institute of Australia Pty Ltd (admin apptd)*, unreported 24 January 2013.

[15] Practice Note SC Eq 3 paragraphs [50]–[53], applied to corporations matters by Practice Note SC Eq 4 paragraph 25.

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.[16] 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 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.[17] The Court may now order, at any stage of proceedings, that an expert be engaged jointly by the parties.[18] 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.[19] 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.[20]

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

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[16] UCPR r 31.19.
[17] P McClellan, "Litigation: Some Contemporary Issues", 26 March 2009, pp 14 – 15
[18] UCPR r 31.37.
[19] 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".
[20] *Idoport Pty Ltd v National Australia Bank* [2001] NSWSC 427; *Higgins v Higgins* [2002] NSWSC 455.

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 proceedings involving a corporation is different, because 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.[21] A failure to commence the proceedings by a solicitor is an irregularity that does not invalidate the proceedings.[22]

Some issues arising in particular applications

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.[23] 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.[24] 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.[25]

Rule 2.1 requires an affidavit demonstrating compliance with publication

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[21] *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.

[22] *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].

[23] Corporations Rules r 2 .2.

[24] *Edenden v Bignell* [2008] NSWSC 666.

[25] *Wily v King* [2010] NSWSC 352

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 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 3 of the Corporations Rules deals with the procedure for applications for approval of schemes of arrangement under Part 5.1 of the *Corporations Act*.

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.

Oppression proceedings

Sections 232 and 233 of the *Corporations Act* deal with the orders that the Court can make in respect of oppression. Section 232 of the *Corporations Act* provides that the Court may make an order under s 233 if:

> "(a) the conduct of a company's affairs[26]; or
> (b) an actual or proposed act or omission by or on behalf of a company; or
> (c) a resolution, or a proposed resolution, of members or a class of members of a company;
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> is either:
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> (d) contrary to the interests of the members as a whole; or
> (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity."

The orders that may be made include, relevantly, an order that the company be wound up (s 233(1)(a)) and an order for the purchase of any shares by any member (s 233(1)(d)). These sections extend to conduct involving "commercial

[26] Section 53 of the Corporations Act in turn identifies the "affairs of a body corporate" for several provisions of the Act, including s 232, as including the "promotion, formation, membership, control, business, trading, transactions and dealings of the body" (s 53(a)) and "the internal management and proceedings of the body" (s 53(c)).

unfairness" or where the conduct complained of involves a visible departure from the standards of fair dealing and a violation of the conditions of fair play, or a decision has been made so as to impose a disadvantage, disability or burden on the plaintiff that, according to ordinary standards of reasonableness and fair dealing, is unfair:[27] In *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672; 19 ACLC 856, Spigelman CJ observed that the statutory formulation of "oppression" confers a wide-ranging remedial jurisdiction on the Court and that jurisdiction should not be confined by technical distinctions. His Honour noted that the individual elements of oppression, unfair prejudice and unfair discrimination referred to in the statutory formulation illuminate each other and each reflect the essential criterion of commercial fairness.

The relevant principles applicable to a claim for oppression were summarised by Austin J in *Tomanovic v Argyle HQ Pty Ltd* [2010] NSWSC 152 at [39], and the Court of Appeal noted the parties did not challenge that summary of the applicable principles in *Tomanovic v Global Mortgage Equity Corporation* [2011] NSWCA 104, (2011) 84 ACSR 121 at [140]. The Court of Appeal also emphasised that each case has to be considered on its own facts and circumstances, and by reference to the conduct as a whole; and in *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304 at [72], French CJ also emphasised that the language and history of the sections indicate that they should be read broadly and the imposition of judge-made limitations on their scope should be approached with caution.

The Court has recently addressed a narrow, but significant, issue in respect of the buy-out of one shareholder by other shareholders in *Byrne v AJ Byrne Pty Ltd* [2012] NSWSC 667. The question in that case was whether the application of a minority discount, where a plaintiff sought to be bought out of his or her shares in a company, amounted to oppression. The plaintiff ultimately accepted in closing submissions that, absent some other act of oppression by the majority shareholders, an offer to buy out his shares subject to a minority discount would not establish oppression. The Court noted that there are several cases where oppression has not been established where a party was willing to buy out the other party at fair value.[28] On the other hand, where oppression or unilateral exclusion of a minority by a majority is established, it will generally not be appropriate to apply a discount to the value of a minority shareholder's shares, where those shares are ordered to be purchased as a result of oppression.[29]

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[27] *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692 at 704; *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459; *Dynasty Pty Ltd v Coombs* (1995) 59 FCR 122; (1995) 138 ALR 64 at 72; *Liosatos v Kefalinian Brotherhood "O Kefalos" of NSW* [2000] NSWSC 1138.

[28] *Tainsh v Barber* (1997) 23 ACSR 158 at 177; *Belgiorno-Zegna v Exben Pty Ltd* [2000] NSWSC 884; (2000) 35 ACSR 305; *Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWSC 342 (2009) 71 ACSR 343; at [108]

[29] *Re Bird Precision Bellows Ltd* [1984] Ch 419 at 430, aff'd [1986] Ch 658; *Re DG Brims & Sons Pty Ltd* (1995) 16 ACSR 559 at 595; *Dynasty Pty Ltd v Coombs* (1995) 59 FCR 122; (2012) 138 ALR 64 at 87; *O'Neill v Phillips* [1999] 1 WLR 1092 at 1107; *CVC/Opportunity Equity Partners Ltd v Almeda* [2002] UKPC 16; [2002] 2 BCLC 108; *Mopeke Pty Ltd v Airport Fine Foods Pty Ltd* [2007] NSWSC 153; (2007) 61 ACSR 395 at [109].

This approach leads to a sensible result, where a majority that forces an except on a minority cannot use that conduct to impose a minority discount upon the minority, and a minority which seeks to exit obtains the value that it would be likely to receive in an arm's length negotiated transaction, which would typically incorporate a minority discount. The Full Court of the Federal Court has also recently emphasised that there is no universal rule that the Court will not order the winding up of a solvent company on the grounds of oppression.[30]

Statutory derivative actions

The Court regularly considers applications to bring statutory derivative actions under s 237 of the *Corporations Act*. The relevant considerations are specified in s 237(2), which requires the Court to grant leave if satisfied of five matters, namely that it is probable that the company will not bring the proceedings; that the applicant is acting in good faith; that the grant of leave is in the best interests of the company; that there is a serious question to be tried; and that at least 14 days notice of the application was given to the company, or alternatively it is appropriate to grant leave even though that provision is not satisfied.

Disputes commonly arise in these applications as to the second criterion, whether the applicant is acting in good faith[31]. The applicant must establish this matter to the Court's satisfaction, and relevant factors include the applicant's honest belief that a good cause of action exists and has reasonable prospects of success (although that belief will be tested against whether a reasonable person in the circumstances would hold that belief) and whether the applicant is seeking to bring the action for a collateral purpose, and it is relatively easy to satisfy this requirement if an application is made by a current shareholder who has more than a token shareholding and the derivative action seeks recovery of property so that the value of the applicant's shares would be increased.[32] There is also frequently controversy as to the third criterion, under s 237(2)(c) of the *Corporations Act*, whether the grant of leave is in the best interests of the company. This test requires more than a prima facie indication that the proceedings may be or are likely to be in the interests of the company and the Court must be satisfied that the proposed action actually is, on the balance of probabilities, in the company's best interest, and relevant matters include the prospects of success of the proceedings, their likely costs, the likely recovery if the proceedings are successful and the likely consequences if they are not.[33]

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[30] *Hillam v Ample Source International Ltd (No 2)* [2012] FCAFC 73; (2012) 202 FCR 336; (2012) 289 ALR 192.

[31] *Chahwan v Euphoric Pty Ltd t/as Clay & Michel* [2008] NSWCA 52; 65 ACSR 661; *Showtime Management Australia Pty Ltd v Showtime Presents Pty Ltd* [2008] NSWSC 618 at [77]

[32] *Swansson v RA Pratt Properties Pty Ltd* [2002] NSWSC 583; (2002) 42 ACSR 313 at 320-321; *Maher v Honeysett and Maher Electrical Contractors Pty Ltd* [2005] NSWSC 859 at [29]; *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2010] NSWSC 91 at [110]–[111]; *Re Gladstone Pacific Nickel Ltd* [2011] NSWSC 1235; (2011) 86 ACSR 432 at [58]

[33] *Swansson v Pratt* above; *Maher v Honeysett and Maher Electrical Contractors Pty Ltd* above at [44].

The authorities in respect of the grant of leave under that section were reviewed by Ball J in *Re Gladstone Pacific Nickel Ltd* [2011] NSWSC 1235; (2011) 86 ACSR 432; and again in *Mathews Capital Partners Pty Ltd v Coal of Queensland Holdings Ltd* [2012] NSWSC 462. In each of those cases, perhaps exceptionally, the Court declined to grant leave to bring the derivative proceedings on the basis that it was not in the best interests of the company to commence those proceedings. Courts in New South Wales typically require a party seeking such leave to indemnify the company against costs, charges and expenses of and incidental to bringing and continuing the derivative claims for which leave is granted.[34]

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.[35] 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.[36] 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.[37]

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*.[38] 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.[39] The better approach may be to treat

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[34] *Mathews Capital Partners Pty Ltd v Coal of Queensland Holdings Ltd* above at [33].
[35] *Corporations Act* s 459G.
[36] *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.
[37] *Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* (1996) 70 FCR 452; 21 ACSR 581 at 587.
[38] *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.
[39] *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.

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.[40]

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*:

> "… 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:

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[40] *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.

> "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."

More recently, 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."

In this context, the Court of Appeal has recently deprecated the practice of "spend[ing] time considering piles of decided cases discussing nuances in the different terminology used by judges throughout Australia who basically are saying the same thing" in winding up cases, noting that approach defeated the purpose of the *Corporations Act* to enable the Court to dispose of disputes in respect of statutory demands in a short and summary way.[41] It is the exception, rather than the rule, for cross-examination to be permitted in applications to set aside a statutory demand.[42]

Approval of settlement agreements, funding agreements and retainers in a liquidation

Approval of a settlement agreement may be required under s 477(2A) of the *Corporations Act* where its effect is to compromise debts exceeding $20,000, and approval is required under s 477(2B) if, example, instalment payments are to be made more than three months after the date of the agreement.[43] The Courts often deal with applications to approve litigation funding agreements in respect of companies in liquidation under s 477(2B) of the *Corporations Act*. That section can also apply to a liquidator's retainer of a solicitor where the retainer agreement will or may end, or obligations of parties to it may be discharged by

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[41] *Infratel Networks Pty Ltd v Gundry's Telco and Rigging Pty Ltd* above at [41].

[42] *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.

[43] For a grant of approval where there were complex competing considerations, see *Re 246 Arabella Investments Pty Ltd (in liq)* [2012] NSWSC 1212.

performance, more than three months after entry into the agreement.[44] The case law emphasises that the Court is not concerned with matters of commercial judgment but whether entry into the agreement is a proper exercise of power and not ill-advised or improper on the part of the liquidator. It is possible that s 477(2B) also applies to an agreement entered into by a liquidator in a voluntary winding up, but the Court also has power to approve such an agreement under s 511 of the *Corporations Act*.

The Court is also from time to time asked to approve settlement agreements, in respect of liquidation or in a voluntary winding up, although approval is not required under s 477(2A) or (2B) of the *Act*. Although it is well established that the Court will not give such a direction in respect of purely commercial considerations, it is more likely to do so where legal issues arise or where there is a significant risk that the liquidator's decision to enter such a settlement will be attacked by a creditor or creditors as unreasonable or made in bad faith.[45]

Winding up financial intermediaries

The Courts are now dealing with complex issues arising in the winding up of financial intermediaries, in the aftermath of the global financial crisis. For example, in *Re MF Global Australia Ltd (in liq)* [2012] NSWSC 994, the Court considered questions as to the application Pt 7.8 Div 2 Subdiv A (ss 981A-981H) of the *Corporations Act* and regs 7.8.01–7.8.05 of the Corporations Regulations, which broadly provide for both segregation and the imposition of a statutory trust over client monies and deal with the distribution of client monies on the insolvency of a financial services licensee.[46] The Court held that each client segregated account maintained by a financial services licensee will generally constitute a separate trust and, in the ordinary course, an account by account distribution will occur on a licensee's insolvency. However, the Court also held that it could direct pooling where that was practically appropriate, for example because funds between various accounts had already been mixed.

The court also held that the use of client funds to hedge client positions was authorised by s 981D of the *Corporations Act* and relevant client agreements and product disclosure statements in that case, and that recoveries from counterparties in respect of hedge positions which had been funded from client monies were monies to which Pt 7.8 Div 2 Subdiv A applied when received and

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[44] *Mustang Marine Australia Services Pty Ltd* [2012] NSWSC 620; *RiverCorp Pty Ltd (recs and mgrs appted) (in liq)* [2012] NSWSC 1078 (approval granted retrospectively).

[45] *Re Addstone Pty Ltd (in liq)* (1997) 25 ACSR 357; *Handberg (in his capacity as liquidator of S & D International Pty Ltd (in liq) v MIG Property Services Pty Ltd* [2010] VSC 336; (2010) 79 ACSR 373; *Re PM Sulcs & Associates Pty Ltd (in liq)* [2012] NSWSC 689; noted D Richardson A Lo Surdo, *Insolvency Law Bulletin*, September 2012, 35.

[46] Similar issues had previously been considered by the Federal Court of Australia in *Georges (in his capacity as joint and several liquidator of Sonray Capital Markets Pty Ltd (in liq)) v Seaborn International (as trustee for the Seaborn Family Trust)* [2012] FCA 75; (2012) 288 ALR 240; 87 ACSR 442, varied *Georges v Seaborn International Pty Ltd (Trustee); Re Sonray Capital Markets Pty Ltd (in liq)* [2012] FCAFC 140; (2012) 206 FCR 408.

would be held on behalf of clients trading in futures and over the counter products respectively, to be distributed in the order of priority set out in reg 7.8.03(6) of the Corporations Regulations. The Court also held that funds subject to the statutory trust arising under s 981H of the *Corporations Act* could not be used to satisfy the intermediary's trade creditors and, in particular, did not accept a novel argument that this could occur by subrogation to a right of indemnity of the intermediary in respect of the statutory trust.

Termination of winding ups

Applications to terminate windings 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.[47] The Courts have on 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.[48] 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.[49] 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.[50] For example, an application for

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[47] *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].
[48] *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.
[49] *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.
[50] *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*

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.

Release of liquidators

Section 480(c) of the *Corporations Act* allows a liquidator who has realised all of the company's property or so much of that property as can, in his or her opinion, be realised without needlessly protracting the winding up, and has distributed any final dividend to the creditors and adjusted the rights of the contributories among themselves and made any final return to the contributories, to apply to the Court for an order that he or she be released. The effect of such an order has been described as to "wipe the slate clean", subject to the limited exceptions set out in s 481(3).[51]

Several practical issues need to be borne in mind in relation to such applications. First, as I noted above, r 2.8 of the Corporations Rules requires notice of such an application to be given to ASIC. Second, the application must be supported by an affidavit addressing the matters specified in rules 7.5(3)-(4) of the Corporations Rules, which allow the Court to be satisfied that the order can properly be made, and r 7.5(6) requires that notice of the application be given to creditors who proved a debt in the winding up and to contributories of the companies. Third, it may not be practical to make such an application until the liquidator has in fact completed the winding up and lodged all necessary reports with ASIC, since an order for the liquidator's release also operates as his or her removal from office, which would then prevent him or her from undertaking those tasks or attending to the deregistration of the company.[52]

An application for release of a liquidator should typically also be combined with an application for an order that ASIC deregister the company under s 481(5)(b) of the *Corporations Act* or for an order terminating the winding up under s 482 of the *Corporations Act*, since the release of the liquidator would otherwise leave

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Workers Compensation (NSW) Ltd v Ferretti Pty Ltd [2006] NSWSC 292; (2006) 57 ACSR 103 at [17].

[51] *Singer v Trustee of the Property of Munro* [1981] 3 All ER 215 at 219 (dealing with the corresponding English provisions in respect of a trustee in bankruptcy); *Re Wayland as Liquidator of ABC Containerline NV (in liq)* [2005] NSWSC 13; (2005) 52 ACSR 750 at [27].

[52] *Corporations Act* s 481(4).

the original winding up order made at the time of his or her appointment in place, without a liquidator being in place.[53]

Proposed reforms to the regulation of insolvency practitioners

The Report of the Senate Economics References Committee, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: The case for a new framework* (September 2010) ("Senate Inquiry Report") raised concerns as to the registration and disciplinary frameworks, insurance obligations and remuneration of registered liquidators and as to the effectiveness of regulatory oversight of liquidators. The government subsequently issued an options paper, *Modernisation and Harmonisation of the Regulatory Framework applying to Insolvency Practitioners in Australia*, in June 2011. The proposed Insolvency Law Reform Bill 2012 would substantially amend both the *Bankruptcy Act* 1966 (Cth) and the *Corporations Act* to introduce common rules in relation to the registration, regulation, discipline and the registration of corporate and personal insolvency practitioners.

The proposed amendments cover a wide range and will affect several areas in which insolvency practitioners are involved in matters before the Court. For example, a new registration process for practitioners in corporate insolvency will be based on the registration process under the *Bankruptcy Act* and the category of "official liquidators" will be removed so that registered liquidators will be able to perform all functions currently performed by official liquidators.[54] It is unclear how this change will affect the Court's practical ability to appoint liquidators in Court-ordered wining ups to companies with few or no assets, where it currently relies on the undertakings given by official liquidators to accept such appointments.[55]

The amendments contemplate that the Court would have a continued role in oversight of insolvency practitioners. The amendments in this regard raise questions as to the extent to which earlier authorities, for example in respect of s 536 of the *Corporations Act*, will provide assistance in respect of the proposed new provisions, the effect of the new provision that the court may take into account the "public confidence" in liquidators in exercising its supervisory powers, and the effect of different standing requirements in Divisions 17 and 32, with the latter allowing standing to any person with a "financial interest" in the administration.[56]

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[53] *Re ABC Containerline* above at [37]; *Re Adellos Pty Ltd (in liq)* (Supreme Court of New South Wales, Black J, 9 April 2013).

[54] Proposed Sch 2 Pt 2 Div 8B, replacing *Corporations Act* ss 1282–1283 and corresponding to *Bankruptcy Act* ss 154A, 155–155C.

[55] This issue was noted Bathurst CJ in his Opening Remarks to the Insolvency Practitioners Association of Australia National Conference, 8 May 2013, pp 10-11.

[56] Proposed Sch 2 Pt 3 Div 17, replacing *Corporations Act* ss 447A, 447E, 479, 482, 511 and *Bankruptcy Act* ss 176 and 179; see also the discussion of the effect of these provisions on

The Insolvency Law Reform Bill would also introduce common rules regarding remuneration and other benefits received by insolvency practitioners; handling of administration funds; provision of information by insolvency practitioners during an external administration; meetings of creditors during an external administration; the committee of inspection and external review of the administration of an insolvency.[57] The proposed amendments seek to address concerns identified by the Senate Inquiry, particularly in the area of communication between practitioners and stakeholders, removal and replacement of practitioners from particular administrations and approval of insolvency practitioners' remuneration.

In the area of remuneration, an insolvency practitioner would be able to claim remuneration specified in a "remuneration determination" or, where it is the first practitioner appointed, a minimum fee of $5500 indexed to CPI. The creditors, a committee of inspection or the Court may make a remuneration determination. The Court may review remuneration determinations.[58]

A new provision would be introduced permitting creditors to request an insolvency practitioner to provide information, by resolution or on an ad hoc basis, and requiring the practitioner to comply with a reasonable request. A request would not be reasonable where there were insufficient funds to cover costs of completing it unless the requestor paid the costs of providing the information. ASIC and ITSA, as applicable, and the Court may direct an insolvency practitioner to provide such information where the request was reasonable.

Section 503 of the *Corporations Act* presently permits the removal of a liquidator in specified circumstances.[59] However, the Consultation Explanatory Document notes that the need for an application to the Court for such a removal is a significant cost barrier to that course. The amendments would allow creditors to remove an insolvency practitioner by resolution and resolve to appoint a replacement. The Court may reinstate the appointment of a practitioner but only

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Corporations Act s 536 by Bathurst CJ in his Opening Remarks to the Insolvency Practitioners Association of Australia National Conference, 8 May 2013, pp 6-10.

[57] Consultation Explanatory Document [1.17].

[58] Proposed Sch 2 Pt 3 Div 22.B, replacing *Corporations Act* ss 473, 449E, *Bankruptcy Act* ss 161B, 162)

[59] See, for example, *SingTel Optus Pty Ltd v Weston* [2012] NSWSC 674; (2012) 90 ACSR 225, where Bergin CJ in Eq made orders for the removal of a special purpose liquidator who had been appointed to deal with the conduct of litigation where a loss of confidence by the creditors, on reasonable grounds, was established; and *Haulotte Australia Pty Ltd v All Area Rentals Pty Ltd (in liq)* [2012] FCA 615; (2012) 90 ACSR 177, where Jessup J held that a liquidator should be removed where that course would be advantageous to the liquidation and those interested in the company's assets, without needing to establish personal unfitness, impropriety or breach of duty on the part of the liquidator.

where it is satisfied the removal was an improper use of the power.[60]

The penalties for breach of directors' obligations to provide a report as to affairs or the company's books to an insolvency practitioner would be strengthened, and the *Corporations Act* would be amended to provide for automatic disqualification of directors who have failed to provide a report as to affairs or the company's books with a liquidator until they comply with those obligations. The Court would have power to set aside such a disqualification if it is satisfied that the person had a reasonable excuse for failing to comply with the requirement.[61]

Conclusion

I have reviewed several aspects of the operation of the Corporations List and several aspect of procedure in the Equity Division generally and the Corporations List in particular. I have also dealt with some of the issues typically arising in common 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.

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[60] Proposed Sch 2, Pt 3, Div 32.D, replacing *Corporations Act* ss 436E, 444A, 446A, 473, 496 and 499.

[61] Proposed *Corporations Act* s 206BB.