23 Nov PJC Hearing Canb – Credit Impairment - QoNs

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CHAIR: In other spheres of private activity the ATO, for example, publishes tables that state, 'Travel and subsistence for a person working for a firm should be in this range for this kind of salary bracket.' Is there any precedent in areas that you are aware of where, when it is such a one-sided negotiation, there is any attempt to codify, regulate or cap the fees that can be reasonably charged?

Mr Brown: Not to my knowledge. I might have to take that on notice for you and have a look to see whether we have anything in ASIC that we have looked at before. I am aware of evidence based research conducted in the UK in 2013 by Professor Elaine Kempson. It is actually an interesting bit of evidence based research, because it highlights the issues of insolvency practitioner remuneration. We were quite sympathetic to a lot of what she found and reported. In there she reported that, where there was a secured creditor involved, fees tended to be about nine per cent lower than if there was an administration where there was no secured creditor, the inference being that the secured creditor brings that leverage to bear. In an administration, recognising that because of the Enterprise Act in the UK from I think 2003 onwards, they do not have the same sort of receivership regime or a receivership regime like we do in Australia now. The secured creditor brings their commercial pressure to bear within the administration itself and they can have that say.

Answer:

A receiver's remuneration is a matter of contract. Their entitlement to remuneration is usually contained in the loan agreement between the secured party and the company. The loan contract may limit the amount of remuneration which can be paid to the receiver, however whether this is the case will depend on the individual loan agreement.

Currently, there is nothing which is similar to the ATO's table that governs remuneration or disbursements of a receiver (i.e: set outs specific amounts for specific type of work performed/expenses incurred).

Section 425 of the *Corporations Act 2001* enables a Court to make an order fixing the amount of remuneration paid to a receiver. In exercising its power, the Court must have regard to whether the remuneration is reasonable, taking into account any or all of the following matters:

(a) the extent to which the work performed by the receiver was reasonably necessary;
(b) the extent to which the work likely to be performed by the receiver is likely to be reasonably necessary;
(c) the period during which the work was, or is likely to be, performed by the receiver;
(d) the quality of the work performed, or likely to be performed, by the receiver;
(e) the complexity (or otherwise) of the work performed, or likely to be performed, by the receiver;
(f) the extent (if any) to which the receiver was, or is likely to be, required to deal with extraordinary issues;
(g) the extent (if any) to which the receiver was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;

(h) the value and nature of any property dealt with, or likely to be dealt with, by the receiver;
(i) whether the receiver was, or is likely to be, required to deal with other external administrators appointed;
(j) the number, attributes and behavior, or the likely number, attributes and behavior of the company's creditors;
(k) if the remuneration is ascertained, in whole or in part, on a time basis: the time properly taken, or likely to be properly taken by the receiver in performing the work; and whether the total remuneration payable to the receiver is capped; and
(l) any other relevant matters.

The Code of Professional Practice (3rd edition) (**Code**) released by the Australian Restructuring Insolvency & Turnaround Association (**ARITA**) contains certain professional standards and principles which provide further guidance regarding remuneration and disbursements for a receiver.

The Code applies to a member of ARITA, and also practitioners with corporate insolvency appointments. Importantly, these professional standards can be considered by the Court or the Companies Auditors and Liquidators Disciplinary Board when determining whether a registered liquidator is adequately and properly performing his or her duties.

The following principle set out by the Code applies to receivers:

1. Principle 10 - Practitioner is entitled to claim remuneration, and disbursements, in respect of necessary work, properly performed in an administration (page 4 of the Code).

Chapter 14 of the Code provides further comments regarding 'necessary and proper remuneration' which include:

(a) a practitioner is entitled to remuneration only in respect of work done;
(b) a practitioner needs to exercise professional and commercial judgement in considering whether work is to be performed;
(c) how to set hourly rates; and
(d) types of disbursements and any restrictions on the types of disbursements including for example: travel should be bought on the best commercial terms and the style and accommodation should be appropriate for the trip being undertaken.

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Senator WILLIAMS: I just have one follow-up about the fees of liquidators and those in the insolvency practitioners industry. We had a case that I questioned many times at Senate estimates about KordaMentha when they liquidated Ansett.
Mr Day: They were the administrators.
Senator WILLIAMS: The administrators, yes.
Mr Day: For the record, they still are.
Senator WILLIAMS: They are still going.
Mr Day: Yes.
Senator WILLIAMS: I think in seven of the ten years they never reported to ASIC. You exempted them from reporting to you. Why would you exempt them from reporting to you?
Mr Day: There are a lot of reasons why ASIC gives that type of relief. That is not the only circumstance with an administrator where we have given that type of relief. There are a lot of varying factors that we have to take into account in terms of the other work that they have to do, whether that would be another expense that obviously creditors have to bear in terms of the reporting to us and those types of things, but we can take that on notice and come back to you.
Senator WILLIAMS: Ansett is still under administration? Is it still going?
Mr Day: That is my understanding.
Mr Brown: I would need to take that on notice, because they have been working with us to bring the administration formally to an end. There is one entity within the myriad Ansett entities that, my recollection is, they must maintain, keep registered, but with the other ones we were working with them to bring about deregistration.
Senator O'NEILL: If businesses took as long to set up as they seem to in winding up we would never have a business established in Australia. That is a most extraordinary scenario with a trailing commission. How long has it gone on? How many years is that?
Senator WILLIAMS: Twelve years.
Mr Day: Yes.
Senator O'NEILL: It is a good job if you can get it. We should talk to career advisers at schools about this.
Mr Brown: Fourteen years ago.
Senator WILLIAMS: They sold assets—
Mr Brown: It was under a deed of company arrangement. My recollection is they brought all the companies under the one deed of company arrangement. That is why they are now seeking, with the companies that are now in a sense defunct, where is nothing left to be done, to bring about their final deregistration.
Senator WILLIAMS: Would it not have been efficient if you had sent in five companies—one for the aircraft, one the spare parts, one the buildings and so on? If you have five companies come in and do little sections of Ansett it would clean the thing up in a couple of years.
Mr Brown: I think you have made—

Answer:
Ansett Australia Ltd (ACN 004 209 410) remains subject to a deed of company arrangement. ASIC deregistered the other 38 companies in the group.

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ACTING CHAIR: It appears that there was an announcement on 18 December 2008 by the Treasurer that the acquisition was to proceed subject to certain conditions. I do not know how we get evidence from the former government about those decisions, how they are taken, whether there may have been some background to it, what information was provided, what assurances were given, and whether the approvals in some way may have even envisaged that the CBA would be acquiring Bankwest, and then trying to reduce their loan book in relation to ostensibly high-risk loans or something. Where would I get that sort of information?

Mr Saadat: It is possible that we were consulted at the time.

ACTING CHAIR: It is possible that you were consulted.

Mr Saadat: We will have to check, but we are not the primary regulator that would have been consulted for those kinds of transactions.

ACTING CHAIR: If you are going to look at those things can you also advise whether you had any advice on the state of their loan book?

Mr Saadat: We can look into that.

ACTING CHAIR: Particularly the issues relating to commercial loans as distinct from the home loan issues, and whether there were potentials for changes and price adjustments. They are issues that have been raised with us and I would like to know—

Mr Day: By that you are referring to the supposed clawback provision?

ACTING CHAIR: Yes, clawback and further warranties. There are different forms in which they are put. Clawback is in relation to the loans at a particular date and those at a later date it may have been warranted that they would have a certain outcome and if they did not meet that they were reassessed.

Mr Day: Yes.

ACTING CHAIR: Those are matters that I would find very helpful.

Mr Day: As I said, we will take that on notice.

Answer:

ASIC has no records of being asked by Government to provide any approval for the Bankwest takeover in 2009 this includes the operation of any ‘clawback’ arrangement.

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Senator KETTER: I was going to raise a similar case that Senator Williams has raised and I note that it is a confidential submission. I note that the submitter, Mr O'Brien, has indicated that he is happy for his name to be mentioned but I am not sure to the extent to which I can go into too much detail in relation to this particular case. Mr Day, perhaps I could ask you how familiar you are with the details of this particular case?

Mr Day: Is this the matter of Mr O'Brien?

Senator KETTER: Yes.

Mr Day: I am somewhat aware of it. As I said before, it does become very detailed in relation to the matters of the pre-sales and other things that Mr Williams said, but I have got some understanding of it.

Senator KETTER: Are you aware of the fact that—without mentioning any particular names—there was an independent assessment done as to the fact that the loan in question was stable and unimpaired?

Mr Day: I would have to take that on notice. I would have to go away and have a look at the documents about that in terms of the independent assessment. That is not something I can recall at the moment.

Answer:

ASIC received a report of alleged misconduct from Mr Rory O'Brien about the treatment of his company's loan originally taken out with the Bank of Western Australia Ltd (Bankwest) and his dispute with the Commonwealth Bank of Australia (CBA).

In response to an ASIC notice, ASIC received a large volume of material from Mr O'Brien in support of his report of misconduct.

The detail in the question does not enable ASIC to confirm specifically if we received and reviewed the assessment document as described. However, we advise that the material available to ASIC from Mr O'Brien at the time included explanatory material setting out Mr O'Brien's concerns as well as correspondence between Mr O'Brien and others about his business, proposed transactions of the business, and the state of his business's financing.

ASIC's Misconduct and Breach Reporting and Deposit-takers, Credit and Insurers teams reviewed the material that Mr O'Brien provided to ASIC. Ultimately, ASIC determined not to take further action in response to Mr O'Brien's report of misconduct. ASIC concluded there was insufficient evidence available to substantiate a breach of a regulatory obligation related to commercial lending to warrant ASIC taking further action. Paragraphs 34-35 of ASIC's submission provides general information on ASIC's approach to reports of alleged misconduct of this nature.

Following the completion of our inquiries, ASIC returned the material that we received under the notice.

ASIC is aware that Mr O'Brien and CBA litigated the dispute in the New South Wales Supreme Court and Court of Appeal. ASIC is also aware that Mr O'Brien settled his dispute with the CBA on 2 May 2014, and the settlement involved Mr O'Brien accepting that certain of his allegations against CBA and/or Bankwest were without foundation and unlikely to succeed.