

Article Information

Authors: Mike Hayes, Dana Zahr

Service: Commercial Disputes, Litigation Funding, Personal Property Securities, Restructuring & Insolvency

A “blatant example of phoenixing” - anti-phoenixing laws to the rescue

In what is a precedent for “Phoenixing” voidable transactions, the Supreme Court of Victoria recently held that a sale agreement of business assets immediately prior to a winding up of a company was a creditor-defeating disposition within the meaning of s 588FDB of the Corporations Act 2001 Cth (Act) and a “Phoenixing” voidable transaction within the meaning of s 588FE(6B) of the Act: *Re Intellicomms Pty Ltd (in liq)* [2022] VSC 228 .

Background

For those who may not be aware, the explanatory memorandum to the Illegal Phoenixing Act describes a creditor - defeating disposition as:

“... a disposition of company property for less than its market value (or the best price reasonably obtainable) that has the effect of preventing, hindering or significantly delaying the property becoming available to meet the demands of the company’s creditors in the winding- up”

Intellicomms operated a business that provided translation services to commercial enterprises in Australia and New Zealand. On 8 September 2021, Intellicomms sold its business assets to Tecnologie Fluenti Pty Ltd (TF) under a sale agreement. Later that day, its sole director (Ms Haynes) convened a meeting and Intellicomms was placed into creditors’ voluntary liquidation. This meeting was convened without informing major shareholders and creditors of the meeting. Liquidators were appointed in the winding up.

Two weeks prior to the appointment of the Liquidators, TF was incorporated for the purpose of acquiring and operating Intellicomms and its associated assets. The sole director and shareholder of TF was Ms Haynes’ sister (Ms Gigliotti). Ms Gigliotti was previously employed by Intellicomms as a financial and payroll administrator.

The Liquidators sought orders that the Court declare the sale agreement a creditor-defeating disposition pursuant to ss 588FDB and 588FE(6B) of the Act. Sections 588FDB and 588FE(6B) were introduced into the Act, with effect from 18 February 2020, to assist Liquidators to recover assets which a company has disposed of property for less than market value in the 12 months prior to winding up. Up until this case, there were no authorities dealing with the operation of these sections.

The “ultimate question for consideration was whether the Liquidators had established that the amount payable under the sale agreement was less than its market value and the best price reasonably obtainable for those assets within the meaning of s 588FDB and, if so, whether the relief sought by the Liquidators should be granted” (at [21]).

Decision

TF admitted that the sale agreement prevented its assigned assets from being available for the benefit of Intellicomms’ creditors in its winding up (per s 588FDB(1)(b)) and that it was entered into when Intellicomms was insolvent (per s 588FE(6B)(b)). The proceeding was also commenced within the time period prescribed by s 588FF(3)(a)(i).

The timing of the events which transpired on 8 September 2021 (the day of its liquidation) were not explained by Ms Haynes. However, the Associate Judge noted that on that day, the compliance period for a statutory demand which had been served by one of Intellicomms' major creditors (QPC) for a debt of \$923,310 was due to expire. It was this major creditor which funded this application.

The Court held that the sale agreement was a creditor-defeating disposition and commented that it also was a "brazen and audacious" example of a phoenix transaction which had the effect of stripping Intellicomms of what assets it had to satisfy the claims of its creditors – placing them beyond their reach.

In reaching this decision, the following factors weighed in favour of granting the Liquidators' orders.

Market value

Ms Haynes caused several valuations to be obtained in February, July, August and September 2021. It was unclear why these separate valuations were conducted over such a short period. However, Ms Haynes provided those conducting the valuations with inputs which reflected an increasingly pessimistic outlook for the company and had the effect of decreasing those valuations.

The Associate Judge was satisfied that Ms Haynes obtained these valuations to minimise the consideration payable by TF, such that it was significantly under value. It also appeared that Ms Haynes arranged for her sister to be TF's director and shareholder to "give the appearance of Ms Haynes being once removed from TF" (at [229]).

Best price reasonably obtainable

There was no need to establish evidence upon which the Court could determine the monetary value of the market value, and best price reasonably obtainable, of Intellicomms' assets. Rather, the Liquidators merely had to establish that, "on the balance of probabilities, the consideration payable under the sale agreement was less than both limbs in s 588FDB" (at [235]).

There was no evidence that Intellicomms sought to sell its assets to a third party or ascertain the real market value of its assets. However, there was clear evidence that QPC was interested in purchasing Intellicomms and, subject to board approval, its assigned assets at a purchase price of between \$500,000 and \$1,000,000.

The sale appeared to be "negotiated in secret" to deprive QPC "of an opportunity to make an offer for the business" (at [230]). This was despite it being apparent that QPC was in a position to purchase Intellicomms and its assets for a price that would have benefitted its creditors. Indeed, it was clear from Ms Haynes evidence that she was "well aware of QPC's interest in Intellicomms' business and with the assistance of her advisors, embarked on a plan to frustrate the legitimate motives of QPC in retrieving its commercial position" (at [232]).

Of interest, there was no evidence to suggest that Ms Haynes contemplated the alternative of appointing voluntary administrators prior to liquidation.

On the basis that the Liquidators were able to establish, on the balance of probabilities, that the consideration payable under the sale agreement was less than both the limbs in s 588FDB, the Associate Judge held that a declaration that the sale agreement was void was warranted.

Takeaways

- The recent amendments to the Corporations Act (s588FDB and s588FE(6B)), pursuant to the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth) (**Illegal Phoenixing Act**), provide an effective tool for Liquidators to combat illegal phoenixing activities
- The onus is on Liquidators, seeking to rely on the creditor-defeating disposition provisions under the Act, to establish that, on a balance of probabilities, the consideration payable under a sale agreement was less than the market value and best price reasonably obtainable at the time of the transaction