

## update

31 October 2008

## Friday Facts: Bell Group insolvent when security taken by banks

*On Wednesday the Supreme Court of Western Australia handed down its decision in Bell Group Ltd (in liq) (“Bell Group”) v Westpac Banking Corporation (“Westpac”)(No 9) [2008] WASC 239. The case (which had been underway since 1995) resulted in the Court finding that a syndicate of banks which refinanced the Bell Group’s debts (a Bond corporation subsidiary) did so when the company was “almost insolvent”.*

The judgment is over 2600 pages long and has been described by commentators as the biggest insolvency case in Australian history. The case had been running since 1995, when the liquidator for the Bell Group (“Liquidator”) brought an action against a Westpac-led syndicate of banks (“Banks”) that refinanced Bell Group loans and the directors of the Bell Group who entered into the refinance arrangements.

The Liquidator argued that the directors entered into security agreements with the Banks to “perfect” the Banks’ security when the directors knew – or ought to have known – that the company was insolvent, thereby breaching their duties as directors. Under the *Corporations Act* (Cth) 2001, a director has an obligation to ensure that a company does not continue to trade if the director knows or ought to know that the company will be unable to pay its debts as and well they fall due.

The Liquidator claimed that, even if the Bell Group directors did not know that the company was insolvent when they sought to refinance their companies’ debts, they knew that the companies were of doubtful

solvency and were therefore in breach of their obligations to act in the companies’ best interests.

The Liquidator further claimed that the Banks took advantage of the Bell Group by securing \$280 million worth of company assets in return for refinancing when they knew that the company was approaching insolvency, and did so in order to “perfect” their securities.

In their defence, the Banks claimed that the Bell Group was not insolvent at the time they took the securities. They argued, in the alternative, that if the Bell Group was insolvent, the Banks had no knowledge of the insolvency.

The Court held that, although the directors might not have known that the companies were insolvent, they ought to have known that the Bell Group was possibly insolvent had they considered the position of the companies objectively. The Court further held that, in all the circumstances, the Banks knew of the existence of the directors’ duties and knew that in taking the securities over the Bell Group assets, they wrongfully received security which they would not have

otherwise received had the directors of the Group not breached their directors’ duties.

This decision has been heralded as a major victory for the Liquidator, who has successfully established a precedent against banks who seek to unfairly boost the security of their assets against other unsecured creditors.

The Court did not make a decision as to how much each of the Banks will be required to pay to the Liquidator, but has urged the parties to mediate as to any carve-up of the \$1.7 billion dollars being claimed.

In the context of the current economic downturn, this judgment serves as a pertinent warning to banks, financiers and company directors to think twice before obtaining an “11th-hour charge” from a company that may be insolvent.

### For more information, contact:

- Mary Nemeth, Partner on  
03 9321 7810  
mnemeth@rigbycooke.com.au

#### To unsubscribe from this publication

If you do not wish to receive publications of this type from us in the future, please notify us by one of the following methods:

- Send an email to [marketing@rigbycooke.com.au](mailto:marketing@rigbycooke.com.au)
- Send a fax message to “Attention: Rigby Cooke Marketing” on fax number +61 3 9321 7900
- Send a letter to “Attention: Rigby Cooke Marketing”, GPO Box 4767UU, Melbourne Vic 3001

Your request to remove you as a subscriber should include the word “unsubscribe” and your full email address to allow us to correctly identify your removal from our lists.

#### Reprint Permission

Articles in this publication may be reproduced in whole or in part, provided that appropriate recognition is given to the author and the firm, and prior approval is obtained. To obtain approval, please contact Rigby Cooke on +61 3 9321 7852 or email [marketing@rigbycooke.com.au](mailto:marketing@rigbycooke.com.au).

#### Disclaimer

This publication contains comments of a general nature only and is provided as an information service. It is not intended to be relied upon, nor is it a substitute for specific professional advice. No responsibility can be accepted by Rigby Cooke Lawyers or the authors for loss occasioned to any person doing anything as a result of any material in this publication.