

## update

6 February 2009

## Friday Facts: Deregistration of company delayed

*In the recent decision of **Programmed Maintenance Services Ltd v Ranelagh House Pty Ltd (in Liq) (2008)**, an unpaid creditor sought an order that ASIC defer the deregistration of a company to enable it to bring its claim against the company despite the fact that there had been a final distribution of funds held by the liquidator.*

Programmed Maintenance Services Ltd (**PMSL**) claimed to be a creditor of Ranelagh House Pty Ltd (**Ranelagh**), which was in liquidation. PMSL asserted that it had a claim against Ranelagh in the sum of \$182,000 for breach of contract.

PMSL notified the liquidator of its claim in August 2008. It was alleged that on 22 September 2008, the liquidator made a final distribution from the available funds without responding to PMSL concerning its claim. There was a significant surplus that was distributed to the members of the company.

The liquidator then proceeded to lodge its final return with ASIC. Under section 509(5) of the *Corporations Act 2001 (Act)*, ASIC was required to deregister Ranelagh on 29 December 2008, being three months from the date the final return was lodged.

Section 509(6) of the Act provides that on application by the liquidator or any other interested party, the Court may make an order that ASIC deregister a company on a specified date. The Court must make this order before the end of the three month period after the liquidator's final return is lodged.

PMSL filed an application with the Federal Court within that three month period seeking,

amongst other things, an order that ASIC delay deregistration of Ranelagh until 15 December 2010 so that PMSL could bring proceedings concerning the validity of its claim.

The Federal Court followed the earlier decision of the Supreme Court of South Australia in *Kerol Pty Ltd v Vergeld Engineering Pty Ltd (in liq) (1998)* and held that PMSL as a creditor had standing to make the application as an "interested party". In *Kerol*, the Supreme Court of South Australia held that section 509(6) of the Act confers a discretion upon the Court to defer the deregistration of a company in two circumstances:

1. Where the continued existence of the company is necessary in order to effect some proper purpose; and
2. Where an interested party needs to make an application in relation to the administration of the liquidation.

The Federal Court held that there were sufficient reasons for it to exercise its discretion to defer the deregistration of Ranelagh. It was held that the continued existence of Ranelagh was necessary for the continuation of the proceeding in which PMSL sought to substantiate its claim for

breach of contract.

It was also held that, depending upon the outcome of the PMSL's action, it may be necessary for the liquidator to seek to recover part of the surplus paid to members to pay PMSL's claim. It was ordered that ASIC delay deregistration of Ranelagh until 15 December 2010.

Jacobson J of the Federal Court noted that the Court's jurisdiction under section 509(6) of the Act cannot be exercised after the expiration of three months of the lodgment of the liquidator's final return and that an order under that sub-section can only be made once.

This decision makes it clear that creditors need to ensure that they bring any action under section 509(6) of the Act within the three month period following the lodgment of the liquidator's final return.

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