

update

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Friday Facts: Secured creditors beware

Quite often creditors who hold a fixed and floating charge consider that their interest is protected if a company goes into liquidation and that they will rank ahead of unsecured creditors. The decision of Tolcher v National Australia Bank Ltd ("Tolcher") reminds us that is not the case.

In Tolcher, Palmer J considered whether a liquidator had a claim to recover an unfair preference under section 588FF(1)(a) of the *Corporations Act* (the "Act") and a claim to recover compensation for loss resulting from insolvent trading under section 588M(2) of the Act. At mediation, the matter was settled and a lump sum in respect of both claims paid to the liquidator.

The question for the court was whether the settlement monies in relation to the unfair preference which were monies relating to the sale of an asset of a secured creditor, were monies which the secured creditor was entitled to or monies which were available for distribution to unsecured creditors.

Palmer J considered comments made by Jones J of the Supreme Court of Queensland in *Jonsson v Ferrier* in which His Honour indicated that monies recovered by a liquidator which were the subject of a voidable transaction under section 588FF(1) would still be subject to any charge which a creditor had over the company's assets. The reasoning used by His Honour was that recoveries under this section became the *property of the company* whereas other recoveries by a liquidator are directed to the *benefit of a company*.

In Tolcher, Palmer J considered the words used in section 588FF(1)(a) of the Act being "an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction" and interpreted them as being paid to the company for the benefit of unsecured creditors and not for the benefit of any secured creditor.

Whilst the Tolcher case was decided by the New South Wales Supreme Court in 2003, since the judgment there has been no reported case which has sought to challenge the findings of Palmer J and therefore it remains the law in Australia.

Accordingly, any money recovered by a liquidator under the provisions of section 588FF(1)(a) of the Act will not flow back to a secured creditor even if the monies recovered were from the sale of a secured asset.

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