



TAYLOR WOODINGS

NEWS FLASH

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Taylor Woodings helps re-affirm the cash flow test of Insolvency

Sydney Partner Quentin Olde has recently assisted the Liquidators of Australian Coal Technology Pty Limited (In Liquidation) (The Company) successfully prove insolvency in a series of substantial unfair preference actions arising out of the collapse of the construction and engineering company.

The Liquidator commenced proceedings against 8 defendants whom were alleged to have received unfair preference payments from the Company. The parties agreed that the Court should first determine, as a separate question, whether the Company was insolvent at the relevant time.

Mr Olde prepared a detailed expert report on which the Liquidators relied. The expert report concluded:

“The Company was insolvent (and as such was experiencing more than a temporary lack of liquidity) throughout the period 30 September 2005 to 3 March 2006. Without detracting from [my opinion], there is greater certainty about the Company being insolvent on and after 30 November 2005 than before that date. This is because the Indicators of Insolvency for 30 September 2005 and 31 October 2005 are not uniformly consistent.”

On 3 March 2009, a hearing on whether the Company was insolvent in the period 30 November 2005 to 3 March 2006 took place before Justice Barrett of the Supreme Court of NSW. Justice Barrett read Mr Olde’s expert report after which Mr Olde was cross examined by a number of barristers on behalf of the Defendants about the veracity of his report. Following closing submissions, Justice Barrett then reserved his judgment.

On 3 April 2009, Justice Barrett delivered judgment in favour of the Liquidators. In his judgment, Justice Barrett:

- Approved of Mr Olde’s methodology for determining when a company is insolvent;
- Held that Mr Olde’s opinion on when the Company became insolvent was “well founded and supported by the evidence”.

In doing so, Justice Barrett re-affirmed the cash flow test of insolvency and made the following relevant observations when determining whether a company is solvent or insolvent.

- S95A of the *Corporations Act* provides a statutory definition of when a company is insolvent;

More information

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- The cases emphasize that solvency is to be determined primarily according to the company's cash flows and whether the company is experiencing a "temporary lack of liquidity" or an "endemic shortage of working capital";
- In that context, the cash position of the company is "all important";
- An inquiry into whether insolvency exists at a particular time is generally assisted by searching for the "usual indicia of insolvency".

How can Taylor Woodings assist you?

The partners of Taylor Woodings have extensive experience acting as expert witnesses for parties involved in litigation.

Aside from acting in the above matter, recent assignments have included:

- Acting as an expert witness for ASIC in the high profile Sydney Investment House matter successful prosecution.
- Acting as an expert witness for a merchant bank who required expert evidence on the conduct expected from a reasonably prudent external administrator.
- Acting as an expert witness for a valuer who required expert evidence on the conduct expected from a reasonably prudent receiver and manager.

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