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Administrators' Remuneration – Recent Cases

In *Coad v Wellness Pursuit Pty Ltd (in liq)* [2009] WASCA 68, the administrator sought payment of his remuneration and costs in priority to any payment to the holder of a third ranking charge. The secured creditor argued that the priority in s443F(2) of the *Corporations Act* (“**Act**”) applied and that its charge ranked ahead of any statutory lien of the administrator. The Western Australian Court of Appeal held that the administrator’s equitable lien over the assets of the company which he realised in administration ranked ahead of the prior fixed charge.

Facts

Coad was appointed voluntary administrator to Vie Inspiree Pty Ltd (“**Company**”) for approximately one month. At the time of his appointment, the Company’s assets were subject to 3 registered charges. Coad was subsequently appointed as liquidator pursuant to a resolution of creditors.

During the administration, Coad operated the Company’s health club business and then sold it. The proceeds from the sale discharged the first two charges in full, but were insufficient to discharge both the third charge and the administrator’s costs, leading to a dispute about priority. Wellness Pursuit Pty Ltd (“**Wellness**”) held the third ranking charge which was fixed in respect of the property sold by the administrator. Whilst Wellness was entitled to appoint a receiver and manager under its charge, the Court noted that it did not do so, and that it was aware that the administrator had been appointed and was acting as administrator.

The lower Court approved the administrator’s remuneration, but held that he had no entitlement to be paid in priority to Wellness.

Appeal

The Court of Appeal found for the administrator. It confirmed that the statutory lien is separate and distinct from the equitable lien. The Court held that an administrator’s equitable lien for his remuneration and properly incurred expenses, attributable to work done “exclusively in caring for, preserving and realising the company’s assets” will have priority over a prior charge that was fixed from its creation if it would be unconscionable for the charge holder to assert priority without the administrator’s remuneration and expenses being first discharged.

Vince v Hurley Transport Pty Ltd

This was an unreported judgment dated 18 December 2008 by Master Eftim of the Supreme Court of Victoria. It was an application by an administrator to fix his remuneration pursuant to section 449E. It is the first decision to apply the amendments to s449E introduced in December 2007.

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The administrator sought approval for \$37,635.45 in remuneration (including remuneration for tasks completed after he was removed), plus \$4,131.86 in legal fees, costs of the application, and for the amount already approved to be paid. The administrator had been removed at the first meeting of creditors, before his fees were approved.

The administrator's application was challenged by a creditor.

Upon reviewing the audited itemised timesheets, the Court said that it cannot be "absolutely sure that the work performed was necessary" without cross-examining the administrator and reviewing every item of work done. This would be unworkable.

The Court was of the view that the rates were reasonable and most of the work was "reasonably necessary", as required by s449E(4)(a). It disallowed 6 items some of which were insufficiently described, and allowed Mr Vince's remuneration in preparing the application and dealing with objections. His remuneration after his termination was allowed as it was "reasonably incurred". The Court found that there was no basis to argue that the work done by Mr Vince should have been done by more junior staff. In fact, most of the work was not undertaken by Mr Vince.

The Court applied the "lodestar" amount approach used in the US referred to by Finkelstein J in *Re Stockford Ltd* (2004) 140 FCR 424. The lodestar amount is reached by the number of hours reasonably spent multiplied by a reasonably hourly rate, and then adjusted (up or down) to reflect other factors including:

- the quality of the work performed;
- the complexity of the administration;
- the novelty and difficulty of the issues faced; and
- the result obtained.

The Court found that the administration was "very short", not complex, and Mr Vince collected \$85,453.07 whilst in office. "On the other hand, the rates charged by Mr Vince are reasonable." In accordance with *Re Stockford*, the Court discounted the remuneration (after the 6 items were removed) by 10%.

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