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Company liquidator selling a company claim

Once a company has been placed into liquidation, the appointed liquidator is required, pursuant to the *Corporations Act 2001* (Cth), to investigate and realise (recover) assets of the company for distribution to unsecured creditors (i.e. persons/companies owed money by the company in liquidation).

The duty of a liquidator to conduct investigations and pursue recovery of those assets is limited if the liquidator is not funded to undertake that work.

Company assets include claims the company may have against third parties for debts owing, claims for damages or lost profit for contract breaches. These claims are capable of being sold by the company liquidator to third parties, enabling the third parties to pursue the claims directly. The claim is sold for an amount which is for the benefit of unsecured creditors now and removes the risk of any further delay caused by commencing legal proceedings for recovery of that claim.

Pursuant to section 477(2B) of the *Corporations Act*, approval to enter into any agreement is required from either the creditors, a committee of inspection or the Court, prior to being entered into.

The liquidator needs to satisfy the Court that the third party that purchases the cause of action has the *financial capacity* to pursue the litigation, which would include meeting any security for costs application.

The liquidator is not required to satisfy the Court that the claim being sold has good prospects of success, as is required if the liquidator were to receive litigation funding to pursue that claim in the liquidator's own right (i.e. in the name of the liquidator and / or company in liquidation directly).

The decision in ***Re Addstone Pty Ltd (in liq) (1998) 83 FCR 583*** identifies the matters a liquidator needs to consider before entering into a funding agreement, including the costs of litigation, the complexity of the claim, the funding available (including adverse costs and security for costs) other funding options and the liquidator's disclosure to creditors.

In the decision of ***In the matter of Kevin Jacobsen Pty Limited (in liq) [2016] NSWSC 538***, Justice Black distinguished the above scenarios and what the liquidator needs to provide to satisfy the Court that a company claim should be sold to a third party. There is no obligation on the liquidator to conduct an investigation into the likelihood of success of the proceeding, only whether the proposed litigation would lead to vexatious or improper litigation. See also ***Bank of Melbourne Ltd v HPM Pty Ltd (in liq) (1997) 26 ACSR 110 (at 112)***.

Please contact SRM Lawyers if you have any enquiries relating to corporate or personal insolvency.

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