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CAN A DIRECTOR'S CLAIM FOR UNPAID WAGES BE SET OFF AGAINST WHAT THAT DIRECTOR OWES TO THE COMPANY?

Once a company is placed into liquidation, section 556 of the *Corporations Act (2001)* (Cth) (**Corps Act**) sets out the order for payment of debts due and owing by the company.

Employees are entitled to payment of their employee entitlements for wages, leave and superannuation before unsecured creditors: section 556(1)(e) of the *Corps Act*. This includes payments to directors up to a maximum of \$2,000 for unpaid wages and \$1,500 for leave entitlements.

Can a liquidator set off / discount claims by directors against the company in liquidation, such as the director's priority statutory entitlements for unpaid wages, superannuation and leave entitlements, against any loans made by the company to the director, which remain due and owing?

Yes. So long as there remains *mutuality of interest* for set off purposes. On that basis, monies owed by the company to superannuation providers and the taxation office on the director's behalf cannot set off / reduce the amount of any monies / loans owed by the director to the company.

In assessing a proof of debt due and payable by the company, a liquidator must set off any claims a company has against that same party, in order to determine the actual amount due and payable by the company, or in fact owing to the company by that same party. See section 553C of the *Corps Act*.

The decision in *Hammersley Iron Pty Ltd v Forge Group Power Pty Ltd (In Liquidation) (Receivers and Managers Appointed)* [2017] WASC (2 June 2017) clarified the effect of section 553C of the *Corps Act* when dealing with registered security interests under the *Personal Property Securities Act*. A third party's registered security interest in effect removes the effect of mutuality between parties, making set off in liquidation redundant.

There is no limitation in section 553C to not set off a director's statutory employment entitlements against a company, against unpaid loans owing by the director back to the company. Both claims are capable of monetary calculation and capable of being set off against each other.

In *Re Parker* (1997) 80 FCR 1, the Court found that a liquidator could set off an insolvent trading claim against the company's parent company from an existing loan debt.

A director or dissatisfied creditor can approach the Court to appeal the liquidator's determination of a proof of debt within 14 days of service of notice of the liquidator's decision, pursuant to regulation 5.6.54 of the *Corporations Regulations*. The object of the set off provisions is to do *substantial justice* between the parties, for the benefit of all creditors that are owed money by the company in liquidation: *Gye v McIntyre* (1991) 98 ALR 393.

Please contact our office if you have a query in respect of claims against companies, directors' entitlements and/or the operation of the set off provisions under the *Corporations/Bankruptcy Acts*.

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