

Episode 128: Summary

Episode name: Balancing the Books: Exploring the Role of a Liquidator in Adjudicating Proofs of Debt

Guest(s): Nik Angelakis

What area(s) of law does this episode consider?

The supposed quasi-judicial role a liquidator plays in adjudicating proofs of debt.

Why is this topic relevant?

The role that liquidators play when adjudicating proofs of debt is complex and presents many unique challenges. Adjudicating proofs of debt involves a thorough evaluation of claims, ensuring that only legitimate debts are admitted. This supposed quasi-judicial function is not merely administrative; it demands a high degree of integrity, legal knowledge, and fairness. Liquidators must navigate between competing interests, often under significant pressure, making their role particularly onerous and impactful on the outcomes of insolvency administrations.

Understanding this particular role is more relevant than ever, as the rate of external administrations is increasing - Insolvency appointments in May of this year, being 2024, reached their highest levels since ASIC started publishing the statistics in 1999. As the number of liquidations increases, we will likely see an increase in the number of claims that liquidators must adjudicate on.

What legislation is considered in this episode?

Corporations Act 2001 (Cth)

Corporations Regulations 2001 (Cth)

What cases are considered in this episode?

Re RM Road Services Pty Ltd (in liq) & Ors [2023] VSC 794

- The liquidators of RM Road Services Pty Ltd and Others sought orders under section 90-15 of the *Insolvency Practice Schedule (Corporations)* (Sch 2 to the *Corporations Act 2001* (Cth)) to compel secured creditors to deliver up assets for realisation. The liquidators argued that they were best placed to conduct an orderly realisation of assets and that the court could have confidence in them fulfilling their statutory obligations. The defendants, however, argued that they had standalone securities and were entitled to enforce them. The court ultimately granted the relief sought by the liquidators, with some adjustments, concluding that the best interests of the creditors are served by the liquidators having control of the orderly realisation of the company's assets under the supervision of the court.

Colbran, in the matter of Balsub Pty Ltd (in liquidation) [2023] FCA 1635

- The liquidator of a company, which had incurred debts both as a trustee and in its own right, sought direction on how to distribute the proceeds of an insolvent trading claim. The court agreed with the liquidator's position that the proceeds should be distributed to all creditors equally, irrespective of the capacity in which the company incurred its debts. This was based on the principle of "equal sharing" or *pari passu*, which underpins section 588M(2) of the *Corporations Act 2001* (Cth). The court also noted that if trust creditors were to

be treated differently, it would be necessary to apportion the proceeds, which would effectively result in a *pari passu* distribution.

Australian Securities and Investments Commission v Edge [2007] VSC 170

- The case involves the conduct of Mr. Edge and Mr. Armistead in their roles as administrators for several companies. The court found their reports to creditors seriously deficient, lacking in independent analysis, company history, and financial position. The reports did not meet the requirements of section 439A of the *Corporations Act 2001* (Cth), which requires a comprehensive report to enable creditors to make informed decisions. The court also found that Mr. Edge's and Mr. Armistead's testimonies were inconsistent and unreliable. The court concluded that the scale of the administration did not justify neglect of fundamental requirements. The court also discussed the obligations of liquidators under section 499(6) of the Act, stating that a report must be self-contained and comprehensive. Justice Dodds-Streeton outlined the essential functions of a liquidator are to identify, take possession of, and realise a company's assets, to investigate and determine the claims against the company, and to apply the assets to the satisfaction of those claims in accordance with the statutory scheme of priority. The liquidator is a fiduciary with high standards of honesty, impartiality, and probity imposed by both the Act and general law. The liquidator also has a statutory duty of care, diligence, and good faith as an officer of the company. The document also mentions that the liquidator's functions are performed in a fiduciary capacity as an agent of the company.

Morgan, in the matter of Traditional Values Management Limited (in liq) [2024] FCA 74

- A managed investment scheme collapsed in 2009-2010. The liquidator's investigations found that from as early as 2007, the responsible entity for the scheme had been using funds from incoming investors to pay income distributions and redemptions to existing investors. Additionally, it was found that an employee of the scheme had fraudulently spent a significant portion of the funds on gambling, recording the amount as fictitious loans. After significant recovery actions, the liquidator was ready to distribute funds to creditors. However, the liquidator identified potential claims by investors, who had seemingly been misled by financial statements and disclosure documents. This was largely due to assets in the loan book being recorded in their full value, despite clear indicators that they were impaired. Given the investors' likely inability to prove reliance on misleading conduct, and the significant depletion of the available pool that would occur from the liquidator's costs in dealing with the claims in the traditional manner, the liquidator sought judicial directions to adopt a modified procedure to admit these claims with a discounted value without requiring direct evidence of reliance. The court granted the liquidator's application.

Re Home and Colonial Insurance Co Ltd [1929] All ER Rep 231

- The court examined the conduct of a liquidator who failed to properly investigate the validity of a large proof of debt submitted by a creditor, resulting in misapplication of company funds. The liquidator was found liable for not exercising the high standard of care and diligence required in his role, despite the lack of warnings from contributories, creditors, or solicitors. The court held that the liquidator could not escape liability by blaming others for his own failure to navigate the complexities of marine insurance law. The case also discussed the discretion of the court in determining the amount of compensation payable for misfeasance under s 215 of the *Companies*

(Consolidation) Act 1908, suggesting that the amount should be just and equitable considering all circumstances.

What are the main points?

- Liquidators play a crucial role in the insolvency process, and are responsible for identifying, taking possession of, and realising a company's assets, investigating and determining claims against the company, and apportioning the assets to satisfy those claims in accordance with the *Corporations Act*.
- Although a liquidator's adjudication of proofs of debt must be based on legal principles, the process of assessment is up to the liquidator's discretion. As such, it is essential for liquidators to act reasonably and give creditors a fair opportunity to present their case, taking into account the available resources in the liquidation process.
- The approach taken by a liquidator in adjudicating proofs of debt may vary depending on the size and complexity of the administration, with considerations such as proportionality and resource allocation being crucial factors in fulfilling their duties effectively.
- Proofs of debt will either be accepted or rejected by a liquidator. If admitted, the creditor may not be informed of the decision. There is no obligation for the liquidator to notify the creditor of the acceptance. If a proof of debt is rejected, the liquidator must notify the creditor of the rejection and set a deadline for appealing the decision.
- Liquidators face the risk of personal liability if their adjudication is appealed and found by the court to have been unreasonable. Any appeals made by other creditors could lead to adverse cost orders against the liquidator personally, potentially resulting in financial burden either from their own pocket, the firm's pocket, or through insurance claims.
- Liquidators often also face challenges in stakeholder management, needing to effectively balance pressure from creditors, with their responsibility to make impartial and independent decisions.
- The success rate of appeals in liquidation cases can be unpredictable due to the opportunity for creditors to present new evidence in court that was not considered by the liquidator. When a proof of debt is rejected by the liquidator, detailed reasons are usually provided, but creditors can introduce different claims and evidence during the appeal process.

What are the practical takeaways?

- Liquidators should seek legal advice where necessary, to ensure they can demonstrate transparency and diligence in their decision-making process.
- Insolvency lawyers can assist with mitigating the risks of personal liability faced by liquidators, by advising them on how to act prudently to avoid potential criticisms from the court, creditors, and the public.
- Law students and young legal professionals seeking to gain experience in insolvency work can benefit from observing court hearings related to insolvency matters, such as those in the winding up list, and attending public creditors' meetings, to witness insolvency proceedings in action.

Show notes

[Angelakis, Nikita. 'The Adjudication of Proofs of Debt in Liquidation: A Background' \(2024\). *Insolvency Law Journal*](#)

[Angelakis, Nikita, 'The Adjudication of Proofs of Debt in Liquidation: On Power and History' \(2024\), *Insolvency Law Journal*](#)

[Angelakis, Nikita, 'The Adjudication of Proofs of Debt in Liquidation: Duties and Obligations' \(2024\), *Insolvency Law Journal*](#)

[ASIC's Current Insolvency Statistics](#)