The "second opinion" special purpose liquidator: A second opinion

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Until relatively recently, the appointment of a special purpose liquidator ("SPL") was largely confined to proven situations of actual or perceived conflict (or lack of independence) on the part of the incumbent liquidator.[1] However, in recent years courts have demonstrated a willingness to entertain the appointment of a SPL in circumstances where no specific concerns are demonstrated with respect to the independence, conduct or judgment of the incumbent liquidator. Today, it appears that where a creditor simply desires a preferred, alternative liquidator to carry out a legitimate investigation — and is only prepared to fund *that* liquidator and no other — the courts may consider that is enough to conclude that the appointment of a SPL would be "both just, and of sufficient utility to the external administration".[2]

This "new", more accommodative attitude of courts to SPL appointments appeared to reach its zenith in *Williams & Kersten Pty Ltd v Walton Constructions (Qld) Pty Ltd (in liq), in the matter of Walton Construction (Qld) Pty Ltd (in liq)* ("*Walton Constructions*").[3] In *Walton Constructions* the Court appointed a SPL to provide a "second opinion" on the incumbent liquidator's completed assessment of some potential recovery claims. Notwithstanding the absence of any conflict or criticism of the liquidator's performance, the appointment of a "second opinion" SPL was obtained by two creditors who were prepared to fund that SPL and no other. Importantly, the SPL was empowered to not only investigate but *also litigate* the relevant claims (which the incumbent liquidators were not intending to pursue).

The "second opinion" SPL appointment in *Walton Constructions* raises legitimate legal and policy questions regarding the justification and use of SPLs. Is this recent shift in judicial attitude a cause for concern or is it a welcome extension of creditors' rights? Do "the ends justify the means" whenever there is a live prospect of a privately-funded recovery at no apparent cost to the existing external administration?

Further, a very recent decision of the Supreme Court of Victoria in *In the matter of Aus Streaming (in Liq)*[4] suggests that open questions of statutory construction remain regarding the factors that are relevant to a court's exercise of discretion to appoint a SPL.

The context and basis for the "second opinion" SPL in *Walton Constructions*

In *Walton Constructions* two creditors sought the appointment of a SPL that would be empowered to investigate and pursue claims — arising from antecedent transactions — that the incumbent liquidators had already assessed as unviable. It is noteworthy that the incumbent liquidators, in making that assessment, "had obtained advice on two separate occasions from different lawyers" which suggests that any legal advice obtained by the SPL would in fact be a third opinion on the potential claims. The liquidators had already obtained judgment in a claim they did opt to pursue — for an uncommercial transaction — in *McCann, in the matter of Walton Construction (Qld) Pty Ltd (in Liq) v QHT Investments Pty Ltd*.[5]

Reeves J made the appointment of the SPL under s 90-15 of the Insolvency Practice Schedule (Corporations) ("IPS") notwithstanding that the applicant creditors "levelled no criticism of the conduct of the Liquidators … nor … criticised their decision not to commence a proceeding of the kind they want the SPL to investigate and consider commencing". Reeves J considered that the circumstances of the antecedent transactions "warrant further investigation and the obtaining of the 'second opinion'" sought by the applicant creditors. Significantly, the fees and expenses of the SPL were not to be paid out of company property available for general unsecured creditors (apart, of course, from proceeds of the claims the SPL was empowered to bring). The risk of pursuing the potential recovery proceedings would be borne by the applicant creditors, the SPL and any relevant litigation funder.

Understandably, the incumbent liquidators made the decision to neither consent to nor oppose the SPL appointment sought by the two applicant creditors on the condition that the SPL was effectively ring fenced from the rest of the liquidation in terms of costs, funding and tasks (including an assurance that the SPL's activities would not "cut across" other actions the incumbent

liquidators were pursuing). Therefore, there was no effective contradictor on the question of whether the SPL appointment should be made.

The "new" judicial attitude to SPL appointments

An application for a SPL appointment can be viewed as a request for a "partial replacement" of an incumbent liquidator: the incumbent's responsibility for a particular task or matter (usually a required investigation) is replaced by the authority and responsibility of the SPL to conduct that specific part of the external administration. For this reason, cases dealing with applications for the "entire" removal and replacement of a liquidator can be instructive when considering the merits of a SPL in certain situations. The willingness of courts to appoint a creditor's preferred SPL to investigate a matter when a creditor refuses to fund an incumbent, *independent* liquidator represents a shift in judicial attitude from that expressed in earlier authorities.

There have been instances of judicial reluctance to accede to a creditor's request for a preferred insolvency practitioner. *Re Evcorp Grains Pty Ltd ACN 134 204 050 (No 2)*[6] involved an application to wind up a company by court order and replace an incumbent voluntary liquidator. Brereton J dismissed the application and stated:[7]

> In the present case, the grounds advanced by the plaintiff do not impugn the independence of the voluntary liquidator, nor assert that he has acted in any such way as would justify his removal. Nor is it suggested that his replacement with a court-appointed liquidator would result in the latter having any powers or being entitled to any remedies that the former would not. Rather, the plaintiff's case was that … [inter alia] the plaintiff would be prepared to fund its liquidator (but presumably not the voluntary liquidator) to conduct investigations and recover any amounts that might be recoverable in respect of voidable transactions and/or insolvent trading. As to the last point, *the Court should not accede to a party's preference for a particular liquidator on account of its threat or promise to fund that liquidator but no other. To do so would encourage parties to be selective in their funding of liquidators for an irrelevant reason*, and effectively abdicate the Court's responsibility to select an appropriate, rather than a party's preferred, liquidator: *Emerton Pty Ltd v Referral Marketing Services Pty Ltd* [2009] NSWSC 738, [27]. (emphasis added)

Emerton Pty Ltd v Referral Marketing Services Pty Ltd[8] ("*Emerton*") was another, earlier "entire replacement" case: ie, an application to *remove and replace* an incumbent liquidator in a creditors' voluntary winding up. A shareholder/creditor complained that the incumbent liquidators had "not diligently investigated" alleged breaches of a director's duties while the reality was that there were no funds available to the liquidators to conduct an "extensive" investigation.[9] The shareholder/creditor was not prepared to fund an investigation by the incumbent liquidators and instead sought the appointment of its preferred liquidator to investigate. The incumbent liquidators were content to resign upon the appointment of a replacement, but Brereton J decided that an order for removal and replacement would be required.

In considering the identity of the appointee, Brereton J said that "in the usual case, all else being equal, and nothing being advanced contrary to the fitness of either nominee, the plaintiff's nominee will ordinarily be appointed".[10] However, Brereton J also stated that a liquidator conducting required investigations "does not do so as the agent of an aggrieved creditor" and noted that the creditor concerned had been seeking the appointment of its preferred liquidator for some 18 months.

Brereton J then concluded:[11]

> *The Court should not be forced to accede to a party's selection of a liquidator by a statement that a creditor is prepared to fund only a particular liquidator*. In my view, having regard to the course of the proceedings to this point, if the Court were to accede to … [the creditor's] application in this respect, there would be an appearance of acceding to … [the creditor's] sustained attempts to have the liquidator of its choice appointed. This would … allow the proceedings to become a vehicle for the plaintiff to secure the appointment, not of an appropriate liquidator, but of the plaintiff's preferred liquidator. That circumstance, I think, takes the case out of the usual class to which I have referred. In those circumstances, I am not prepared to appoint … [the creditor's preferred liquidator]. To do so would have too much the appearance of acceding to the plaintiff's choice of a preferred liquidator, rather than appointment of an impartial or an appropriate liquidator. (emphasis added)

However, this earlier reticence of Brereton J towards creditor-preferred liquidators does not appear to have found favour in subsequent cases where other judges have had few qualms in replacing liquidators where an investigation was warranted and the applicant creditor was only prepared to fund a particular liquidator (despite the absence of any demonstrated unfitness, impropriety or breach of duty on the part of the incumbent).

In *Termicide Pest Control Pty Ltd, in the matter of Granitgard Pty Ltd (in liq) v Albarran*[12] the Court viewed the financial resources accessible by the preferred liquidator as the determining factor in what was otherwise a "finely balanced case". More recently, the decisions in *GDK Projects Pty Ltd, in the matter of Umberto Pty Ltd (in liq) v Umberto Pty Ltd (in liq)*[13] and *Deputy Commissioner of Taxation, in the matter of Italian Prestige Jewellery Pty Ltd (in liq) ACN 116 031 022 v Italian Prestige Jewellery Pty Ltd*[14] are

examples of courts appointing SPLs in circumstances where:

- the applicant creditor was prepared to fund only its preferred liquidator; and
- there was no substantive complaint regarding the incumbent liquidator, other than a vague dissatisfaction or lack of confidence in the incumbent liquidators (either by dint of the voluntary nature of their appointment by the company or with respect to the progress of certain investigations in circumstances where the incumbents had limited or no funding).

In considering whether an antecedent transaction should be investigated by the incumbent liquidator or the proposed replacement, it is unsurprising that judges will give considerable weight to the replacement's access to funding and conclude that a SPL appointment is "for the better conduct of the liquidation" (as they did in all three cases just mentioned).[15]

Even so, the advent of the "second opinion" SPL in *Walton Constructions* represents a further, controversial extension of the court's jurisdiction to appoint a SPL. The distinguishing feature of the appointment of a "second opinion" SPL is that the key investigations *have been completed* by the incumbent liquidator and consequential *decisions have been made* (eg, to *not* pursue a recovery claim assessed as unviable nor initiate court proceedings). An application for a "second opinion" SPL does not raise the question of which insolvency practitioner is better placed carry out a required investigation; rather, it is a request of a court to disturb or revisit the commercial judgment of an independent, incumbent liquidator.

Challenging the legal basis for a "second opinion" SPL

Before canvassing the legal (and policy) grounds upon which the legitimacy of a "second opinion" SPL might be questioned, it is important to acknowledge the key considerations usually submitted in favour of such an appointment:

- The applicants' proposed funding arrangements invariably ensure that no cost to the general liquidation or the interests of creditors will be occasioned by the SPL;[16]
- From the perspective of the general unsecured creditors, there is nothing to be lost and there is the possibility of a gain (dividend) if a recovery is achieved by the SPL;
- The "different perspective"[17] provided by a "second opinion" SPL promotes creditors' rights and participation in liquidations and incentivises funding to support investigations and recovery proceedings where such funding would otherwise not materialise (what might be described as "public interest" factors).

However, the appointment of a mere, "second opinion" SPL — in the absence of any conflict or performance issue afflicting the incumbent liquidator — sits in tension with authorities dealing with requests to interfere in matters of commercial judgment of an incumbent liquidator.

"Second-guessing" the commercial judgment of a liquidator

In *Honest Remark Pty Ltd v Allstate Explorations NL* [2006] NSWSC 735; BC200605562, a case involving a voluntary administration, Brereton J refused an order for a "special purpose administrator" sought for the purpose of investigating aspects of the incumbent's conduct of the administration. Brereton J described the issue in the application as "whether there is power to appoint a special purpose administrator for the purpose of investigating and reporting to the court on the original administrators' conduct of their administration."[18] Brereton J found that such a purpose was impermissible.

In reaching that conclusion, Brereton J canvassed a line of earlier authorities where SPLs had been appointed by the Court, including:

- *Re Obie Pty Ltd (No 2)* [1984] 2 Qd R 155, where the Court appointed a SPL to investigate the company's potential claim against an accounting firm of which the two incumbent liquidators were a current and former partner. The claim arose out of pre-liquidation advice provided by the firm to the company, not from the conduct of the liquidation by the incumbent liquidators. Significantly, Thomas J stated that a liquidator's decision regarding the viability of a claim of the company in liquidation:

  > will eventually have to be taken by a liquidator after assessing the available evidence, the strength of the material available to the other side, and the probable economic advantage or disadvantage to the company. In short, it will be the sort of decision that liquidators frequently have to make in the course of a winding up. *It will require commercial judgment* as well as legal advice; (emphasis added)

- *Re Spedley Securities Ltd (in liq)* (1990) 4 ACSR 555, where a SPL was appointed to oversee an aspect of a liquidation involving a potential claim against a third party company of which the incumbent liquidators' firms were auditors;
- *Onefone Australia Pty Ltd v One.Tel Ltd (in liq)* (2003) 48 ACSR 562; [2003] NSWSC 1228; BC200307964, in which a SPL was appointed for

> the purpose of investigating any claims which might exist in relation to a pre-liquidation cancellation of a rights issue with which the incumbent liquidators had some involvement just prior to being appointed as administrators. Windeyer J observed that "the original liquidators might be joined to the prospective litigation, which would place them in an almost impossible position".

It is noteworthy that in every one of the SPL cases considered by Brereton J in *Honest Remark*:

- The court had considered a situation of conflict or lack of independence that raised a legitimate concern for the incumbent liquidator carrying out a certain task (usually because of the incumbent's interest in the outcome of a required investigation);
- There was no suggestion of the SPL *revisiting* the outcome of an investigation already carried out by an *independent* liquidator; and
- The purpose of the appointed SPL was *not* to investigate the incumbent liquidator's conduct of the liquidation.

On this last point, Brereton J stated:

> There are very good reasons why this is so. The investigation of the conduct of a liquidator *qua* liquidator is not part of the matters entrusted to a liquidator; it is a supervisory function of the court. The court does not readily embark on or permit inquiries into the conduct of liquidators, in the absence of conduct liable to attract sanctions or control for what might broadly be described as disciplinary reasons.

Brereton J then drew some instructive conclusions on the nature and function of a SPL:

> [I]n *Naumoski v Parbery* (2002) 171 FLR 332, the … judge, holding that the court should not interfere with the exercise of a liquidator's statutory powers, a fortiori where the decision was one of commercial judgment, cited the words of C E Harman J in *Re Debtor* [1949] Ch 236 at 241, that "*administration in bankruptcy would be impossible if the trustee must answer at every step to the bankrupt for the exercise of his powers and discretions in the management and realisation of the property*" …
> *A special purpose liquidator is appointed to co-exist with the existing liquidators, to fulfil a specific purpose which would otherwise form part of the responsibilities of the original liquidator, but which is carved out from those usual responsibilities because of difficulties in the original liquidator performing it.* Because the investigation of the conduct of a liquidator is not part of the matters entrusted to a liquidator, but a supervisory function of the court, an investigation by one of several liquidators into the conduct of another in the liquidation does not involve carving out of the liquidation a part of the ordinary responsibilities of the liquidator. *To the contrary, it involves circumventing the ordinary and proper procedures for supervision of liquidators, and the protections that attend them*. (emphasis added)

Providing for "the better conduct" of a liquidation or challenging decisions made during the conduct of a liquidation?

These observations by Brereton J in *Honest Remark* regarding the nature of a SPL are pertinent to a court's exercise of discretion to appoint a SPL solely for the purpose of obtaining a "second opinion" on a liquidator's commercial judgment. Once a commercial judgment has been made — and a decision taken — by a liquidator, it could be said that the appropriate recourse for any party dissatisfied with that decision is to invoke the Court's supervisory jurisdiction under Div 90 of the IPS *to review that decision*. Of course, upon such an application, the aggrieved stakeholder would ordinarily be expected to demonstrate grounds for legitimate concern regarding the decision that was made and not simply make a bald request for a review *de novo*.

Indeed, prior to the amendments to the Corporations Act 2001 (Cth) ("the Act") made by the Insolvency Law Reform Act 2016 (Cth) ("ILRA"), the distinction between *challenging a decision* of a liquidator and *seeking the liquidator's removal and replacement* had received judicial support. In *Domino Hire v Pioneer Park*[19] Austin J stated that "if the complaint relates to a particular decision of the liquidator, it seems to me that the appropriate course is to appeal to the Court under s 1321, even if the substance of the complaint is that the decision demonstrates incompetence or bias or other unfitness for office."[20]

The ILRA repealed s 1321 of the Act and challenges to decisions of liquidators are now brought under s 90-15 of the IPS, the same provision under which any appointment of a SPL is sought and made. Section 90-15 is cast in broader terms than the various provisions of the Act it replaced. However, surely a distinction should still be drawn between:

- A question of the responsibility for the *future* (better) conduct of a liquidation (or part of it); and
- A question regarding the *past* conduct of a liquidation — specifically, a creditor's dissatisfaction with the outcome of a commercial judgment and decision that was reasonably open to the incumbent liquidator.

The same point appeared to arise in *Melhelm Pty Ltd, in the matter of Boka Beverages Pty Ltd (in liq) v Boka Beverages Pty Ltd (in liq)*.[21] An asserted creditor, whose proof of debt had been rejected, successfully applied for the appointment of a SPL to conduct certain investigations. Curiously, the SPL sought by the applicant was appointed not only to pursue the required investigations but to also revisit the proof of debt (previously rejected by the general purpose liquidator) and decide whether to

revoke that decision under reg 5.6.55 of the Corporations Regulations 2001 (Cth). The perceived lack of independence of a SPL reviewing a rejected proof of debt lodged by the very party that sought that SPL's appointment did not appear to trouble the Court (nor did the fact that reg 5.6.54 specifically provides for an appeal *to the Court* against a rejected proof of debt). Far from addressing a situation of conflict, it could be contended that this particular SPL appointment created a conflict where none previously existed.[22]

Special considerations for court-appointed liquidators?

Brereton J's reference (in *Honest Remark*) to courts' protection of their own processes and officers also raises a question whether the decision to appoint a SPL — to co-exist with an incumbent *court-appointed* liquidator — attracts its own, specific considerations. There is a substantial line of authority for the proposition that courts will provide a significant degree of protection to their officers who have exercised and discharged their role and powers in a reasonable and proper manner. In the recent decision of *Aardwolf Industries LLC v Riad Tayeh*,[23] Rees J of the NSW Supreme Court refused to grant leave to sue two joint liquidators and paid regard to the following judicial statements of principle:[24]

- "[t]he court will be very jealous of its delegate exercising the powers that it is given [under the *Corporations Act*] … and will take every precaution to make sure that those powers are used impartially and for a proper purpose … and will not permit its officers to be sued by a creditor or have an inquiry made under s 536 unless it is satisfied that there is a prima facie case";[25]
- "The discretionary power of the Court to grant leave [to sue a liquidator] must be exercised having regard to all the circumstances of the particular cases and bearing in mind the need to protect the integrity of its process. It does not necessarily follow that, in order to obtain leave, a prima facie case must be demonstrated. There is no specific threshold appropriate in all cases, however there must be more than mere assertion. The Court's discretion may be exercised on many grounds including, but not limited to, the sufficiency of the evidence adduced as to the prospect of success of the action on the application for leave";[26]
- "[A] court appointed liquidator … undertakes [his/her role] as a representative of the court. When acting in such a position, *the court takes the view that the actions of the appointed official are to be deemed as actions of the court*. This proposition can be traced back to a decision of Lord Chancellor Brougham in *Aston v Heron* (1834) 2 My & K 390 at 396–7; 39 ER 993 at 995 … and 'there is a close relationship between a court and a court-appointed liquidator; so much so that it will protect the liquidator as one of its officers, through the same processes by which it will protect its own processes."[27] (emphasis added)

One might ask whether a court would be undermining the integrity of its own winding up processes (and indeed its officers) by appointing a SPL to revisit a matter of commercial judgment simply because one creditor is not prepared to accept the outcome of a reasonably-made decision of an incumbent, court-appointed liquidator.

Is a "second opinion" SPL simply a *de facto* "reviewing liquidator"?

If a court can in any event appoint a "reviewing liquidator" under Div 90 of the IPS (eg, for the purpose of revisiting an incumbent's concluded investigation and associated decision), do the concerns for "second opinion" SPLs lose any force? If a "second opinion" SPL were to serve the same role as a "reviewing liquidator" does it really matter how the role is described? This question can be answered in three points:

- A SPL and a reviewing liquidator are appointed under different provisions of the IPS;
- The "second opinion" SPL appointed in *Walton Constructions* was authorised to conduct another investigation *and to pursue those relevant claims* as liquidator (including initiating court proceedings). This is a broader suite of powers than those enjoyed by a reviewing liquidator who simply conducts a review commissioned by the Court and "reports back". A reviewing liquidator is empowered to review a matter but *not* to conduct any aspect of the liquidation, let alone litigate a claim of the company: IPRs s 90-22;
- The competing considerations observed by courts in exercising the jurisdiction to appoint a SPL are equally relevant to ASIC or a Court determining whether the appointment of a reviewing liquidator is "appropriate": IPS s 90-23(1) and (7).

In summary, there are good reasons for future courts to carefully consider whether the weight of authority and the new legislative framework of Div 90 permits the appointment of a SPL for the purpose of fulfilling a creditor's bald request to revisit (or "interfere with") the reasonable, commercial judgment of an incumbent liquidator.

Open questions regarding the proper construction of IPS s 90-15: Recent VSC decision

Some of the above points were very recently endorsed (albeit in *obiter*) by Justice Connock of the Victorian Supreme Court. *In the matter of Aus Streaming (in liq)*[28] was ultimately a straightforward decision to appoint a SPL for the "confined" purpose of conducting certain investigations. However, Connock J made a passing reference to the above-mentioned reasoning of Brereton J in *Honest Remark* and stated:[29]

> Although these observations were made prior to the introduction of … s 90-15, their underlying force appears to continue to resonate in the context of applications for the appointment of special purpose liquidators made pursuant to s 90-15 — at least so far as the exercise of discretion is concerned. Whether or not the same force remains in relation to the question of the court's power under s 90-15 to make such an order need not be explored given the facts of the present application … If the occasion arises for this issue to be considered in the future, no doubt one of the relevant matters will be the extent to which, if any, the specific review powers set out in subdivision C of Schedule 2 [ie, appointment of a reviewing liquidator] impact upon the proper construction of s 90-15(1) in this regard.

Policy concerns regarding "second opinion" SPLs

The case law canvassed above also highlights genuine policy considerations surrounding the emergence of "second opinion" SPLs. Reasonable minds may disagree on some of the points, but it is important that they are acknowledged and debated. Beyond the immediate outcome for stakeholders in a specific liquidation, a prevalence of "second opinion" SPLs may have negative consequences for insolvency practice and outcomes in external administrations.

Firstly, as noted by Brereton J, it is undesirable for liquidators to have to "answer at every step … for the exercise of … [their] powers and discretions in the management and realisation of the [company's] property".[30] Is it reasonable to expect liquidators to have their conduct and decision-making questioned and then reviewed for no demonstrated reason other than the mere wish of a creditor?

A second issue is efficiency in winding up a company's affairs. The importance of a liquidator's timeliness and diligence in conducting a winding up has long been recognised by courts and professional standards.[31] There are public policy arguments for promoting the *finality* of commercial decisions and judgments *reasonably made* by liquidators. More "second opinion" SPLs — revisiting competent, commercial judgments of professional insolvency practitioners — will prolong liquidations and delay their finalisation. The incumbent liquidator in *Walton Constructions* had been appointed to replace original liquidators whose independence had been found wanting by the Full Federal Court.[32] The "second opinion" SPL in *Walton Constructions* appears to be the third liquidator in that winding up. Apparently, not only does the law require an independent liquidator's perspective on a potential claim, it may also further demand the "different perspective" of a SPL.

Thirdly, there is authority for the proposition that a court, when considering whether to replace an existing liquidator, should consider the potential effect on the professional reputation and standing of the incumbent.[33] Do these considerations not equally apply to incumbent liquidators who have done their level best and acquitted themselves competently and properly?

Fourthly, will "second opinion" SPLs (funded by a creditor) be more inclined to initiate speculative litigation that an incumbent has previously assessed as improper to pursue? If so, will that have an effect on the commercial judgment of *incumbent* liquidators who will be mindful that any decision not to sue may be reviewed at the behest of any creditor that chooses to "purchase" a second opinion? Will more "second opinion" SPLs incentivise unmeritorious litigation?

Conclusion

The appointment of a "second opinion" SPL does not "outsource" the conduct of a winding up but it does appear to devolve matters of commercial judgment that have long been understood as the domain of an independent, qualified and professional insolvency practitioner. Courts are usually reluctant to conclude that a liquidator's independence is compromised due to a connection with a creditor such as a funding arrangement. Indeed, there has been judicial encouragement of the practice.[34] However, the advent of "hired gun" SPLs may create new threats to independence and the integrity of the winding up process.

It is hoped that courts, when engaging with open questions regarding the proper construction of the relevant legislation, will give more attention and consideration to the legitimate legal and policy concerns surrounding the prevalence of SPL appointments and the purposes they serve.

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Footnotes

1. N McHattan "Spotlight on SPLs" (2019) *ARITA Journal* 31(4) 21. McHattan's review of cases of court-appointed SPLs confirmed that the typical impediment afflicting an incumbent liquidator (justifying a SPL) is a legal or commercial conflict (ie, a perception of a lack of independence or an apparent reluctance to conduct certain investigations due to a "commercial connection" with the subject).
2. *GDK Projects Pty Ltd, Umberto Pty Ltd (in liq) v Umberto Pty Ltd (in liq)* [2018] FCA 541; BC201814297 and *Deputy Commissioner of Taxation, Italian Prestige Jewellery Pty Ltd (in liq) ACN 116 031 022 v Italian Prestige Jewellery* (2018) 129 ACSR 115; [2018] FCA 983; BC201805750, both discussed in McHattan n 1 above. Applications for a SPL in such cases are invariably made by a creditor that is committed to fund a desired investigations and potential recovery action *if, and only if,* its preferred liquidator is appointed and charged with the task.
3. *Williams & Kersten Pty Ltd v Walton Construction (Qld) Pty Ltd (in liq), Walton Construction (Qld) Pty Ltd (in liq)* [2019] FCA 1201; BC201906847.
4. *Re Aus Streaming (in liq)* [2020] VSC 313; BC202004740.
5. *McCann, Re Walton Construction (Qld) Pty Ltd (In Liq) v QHT Investments Pty Ltd* [2018] FCA 1986; BC201811959. For an analysis of this decision, see J Harris "Voidable transaction risks in restructuring" (2019) 20(1) *INSLB* 4.
6. *Re Evcorp Grains Pty Ltd (No 2)* [2014] NSWSC 155; BC201401113.
7. Ibid at [20]–[21].
8. *Emerton Pty Ltd v Referral Marketing Services Pty Ltd* [2009] NSWSC 738; BC200906626.
9. Ibid at [4].
10. Brereton J cited *Parkinson v Morkaya* [2008] NSWSC 1183; BC200809837, *Glenwood Village Pty Ltd v Glen Alpine Constructions Pty Ltd* [2009] NSWSC 516; BC200905000 and *Leveraged Capital Pty Ltd v Modena Imports Pty Ltd* [2009] NSWSC 509; BC200904998.
11. Ibid at [27].
12. *Re Termicied Pest Control Ltd; Granitard Pty Ltd (in liq) v Albarran* [2011] FCA 1410; BC201109850 at [9] and [14]. Reeves J stated at [12] that "I should make it clear that my decision is not based upon any finding of actual or perceived bias or partiality on the part of the defendants, nor any unfitness, impropriety, or breach of duty on their part. Instead it is based on a somewhat pragmatic assessment as to which of the two groups of liquidators will be in the best position to conduct the thorough investigation … that all the parties agree should be undertaken."
13. *GDK Projects Pty Ltd, Umberto Pty Ltd (in liq) v Umberto Pty Ltd (in liq)* [2018] FCA 541; BC201814297.
14. *Deputy Commissioner of Taxation, Italian Prestige Jewellery Pty Ltd (in liq) ACN 116 031 022 v Italian Prestige Jewellery Pty Ltd* (2018) 129 ACSR 115; [2018] FCA 983; BC201805750.
15. *Re Termicied Pest Control Ltd; Granitard Pty Ltd (in liq) v Albarran* [2011] FCA 1410; BC201109850 at [9].
16. For a recent example, see *Reidy as Trustee for the PR Mining Superannuation Fund v Contained Gold Pty Ltd* [2020] FCA 268; BC202001635 at [43]–[46].
17. A "different perspective" was a concept submitted by the applicant creditors in *Walton Constructions*.
18. *Honest Remark Pty Ltd v Allstate Explorations NL* [2006] NSWSC 735; 201 FLR 456; BC200605562, [50].
19. *Domino Hire Pty Ltd v Pioneer Park Pty Ltd (in liq)* [2003] NSWSC 496; BC200302925.
20. Ibid, at [66]. See also *Re Ivory Cape Pty Ltd (in liq) Informed Sources Finance Pty Ltd v Cole, Robert Molesworth Hobill* [1996] FCA 593 per Olney J who refused to remove a liquidator.
21. *Melhelm Pty Ltd, Boka Beverages Pty Ltd (in liq) v Boka Beverages Pty Ltd (in liq)* [2019] FCA 1184; BC201906808.
22. The solicitors for the SPL did provide an undertaking that they would "refrain from advising the SPLs on the proof of debt lodged by the first plaintiff … and rejected by the GPLs … and on whether the SPLs ought to exercise the power conferred by reg 5.6.55 of the Corporations Regulations 2001 (Cth) in relation to that proof of debt": *Melhelm Pty Ltd, in the matter of Boka Beverages Pty Ltd (in liq) v Boka Beverages Pty Ltd (in liq) (No 2)* [2019] FCA 1809; BC201911190 at [3]. Ultimately however, it appears that the party lodging the rejected proof of debt was able to nominate the decision-maker tasked with reviewing that rejection.
23. *Aardwolf Industries LLC v Riad Tayeh* [2020] NSWSC 299; BC202002304.
24. *Aardwolf Industries LLC v Riad Tayeh* [2020] NSWSC 299; BC202002304 at [81]–[84] per Rees J. Rees J at [130] refused leave "to sue the liquidators for how they did their job", considering it "necessary to protect the integrity of the winding up process".
25. *Re Biposo Pty Ltd; Condon v Rodgers* (1995) 13 ACLC 1271; (1995) 120 FLR 399; BC9505177 at 403 per Young J, citing *Re Siromath Pty Ltd (No 1)* (1991) 9 ACLC 1580; BC9101585 at 1590.
26. *Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd, Kotselas & Hamilton* (1996) 65 FCR 234; BC9601203 at 242.
27. *Eighty Second Agenda Pty Ltd v Handberg* [2014] VSC 665; (2014) 32 ACLC 14-081; BC201410955 per Croft J at [18]–[22].
28. *Re Aus Streaming (in liq)* [2020] VSC 313.
29. Ibid at [50].
30. Brereton J in *Honest Remark Pty Ltd v Allstate Explorations NL* [2006] NSWSC 735; BC200605562, citing *Naumoski v Parbery* (2002) 171 FLR 332; [2002] NSWSC 1097; BC200206918 and *Re Debtor* [1949] Ch 236 at 241.

31. See for example, s 5.12(iii) of the *ARITA Code of Ethics*, ARITA Code of Professional Practice (4th edn), effective 1 January 2020 (www.arita.com.au).
32. *Re ASIC v Franklin (liquidator), Walton Constructions Pty Ltd* [2014] FCAFC 85; BC201405546.
33. *Re Edennote Ltd; Tottenham Hotspur plc v Ryman* [1996] 2 BCLC 389; [1996] BCC 718 at 398.
34. *Re Allebart Pty Ltd* [1971] 1 NSWLR 24 per Street J at 27–28 and *National Australia Bank Ltd v Wily* [2002] NSWSC 573; BC200203509.