Some Issues relating to Void Dispositions
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Introduction

It is a fundamental tenet of the Australian insolvency regime that all of the assets of an insolvent company should be divided rateably among its creditors. To achieve this aim a raft of provisions have been enacted in the *Corporations Act* which include the provisions relating to unfair preferences, uncommercial transactions and, importantly for today’s purposes, void dispositions.

Going back a couple of centuries, the intention of the English counterpart of what is now our void dispositions section (s468) was that during the period after which a creditor’s petition had been presented for the liquidation of the company and prior to the time at which an order was made for the winding up of that company, a company was to be prevented from making a disposition which was an improper alienation of its property.

It was thought that as a matter of general principle, because the controlling mind of the company was effectively on notice after a petition had been presented, the actual disposition of property was deemed to be void, rather than voidable (as is the case for voidable preferences). This is quite an important distinction which has been confused by a couple of hundred years of inconsistent case law. I will deal with the “void” or “voidable” distinction in more detail later in this paper.

Prior to the 1993 amendments to the *Corporations Act* pre-empted by the Harmer Report, the scope of void dispositions was much wider because the relevant date that winding up was taken to have commenced. The pre-1993 provision provided that a disposition was void if it was entered into after an application had been filed for winding up but before an order was made. The new provision changes this and makes the date of commencement of the winding up (usually) the actual date the winding order is made by a court. What that really means is that the scope of void dispositions is now much narrower than previously.

Prior to the 1993 amendments there was some dispute as to whether a transaction or disposition occurring after the date the winding application was filed and the date the winding up order was made was properly attacked either as a voidable preference or as a void transaction under s468.
The Harmer Report actually recommended that the preference provisions be limited to the relation back period before the date winding up applications were filed so that everything after the date the application was filed was to be covered by s468. For reasons that have never been made clear, the amendments actually put through Parliament didn’t accept that recommendation and instead relegated s468 for use only for dispositions made after the winding up order was made, leaving everything before that date to be a potential voidable transaction only.

The difficulty from a liquidator’s perspective of this change is that if everything after the date a winding up application had been filed was a void disposition, then it was automatically void and unless a court determined to authorise it, the liquidator was simply entitled to get the payment or disposition back. By contrast, now that the voidable transaction provisions apply to transactions within that period, all of the complicated defence provisions (good faith, ordinary course of business, no reason to suspect insolvency etc.) apply, which makes the whole process more complicated and harder for a liquidator to successfully recover. The entire purpose of a void disposition was to make the liquidator’s job easy and that has really been taken away by this amendment.

To take an extreme example, if a company the subject of a winding up application decides, the day before a winding up order is made, that it is clearly insolvent and it needs to get rid of a whole bunch of its assets pretty quickly to keep them out of the reach of its creditors, then even an obvious transaction the date before the winding up order was made will need to be attacked by a liquidator under the much more complex voidable transaction provisions rather than as a void transaction.

1. Overview

2.1 Section 468(1) provides:

Any disposition of property of the company, other than an exempt disposition, and any other transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court is, unless the Court otherwise orders, void.

There are essentially four elements to s468:

(a) there was a disposition of property;
(b) the property was property of the company;
(c) the disposition was not exempt; and
(d) the disposition occurred after the commencement of the winding up.

1.2 Disposition of Property

As you would expect, “disposition” has been held to cover sale, encumbrance, and transfer of a company’s property as well as payments of money by the company.

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1 Re Selmar Pty Ltd [1978] VR 531.
2 Jardio Holdings Pty Ltd v Dorcon Construction Pty Ltd (1984) 2 ACLC 574.
Section 468 does not prohibit the passing of a resolution increasing the authorised share capital and the consequential allotment of shares, the completion of a specifically enforceable contract, or the forfeiture of a joint venturer’s interest in a joint venture to the other joint venturers.

1.3 Property of the company

“Property of the company” should in theory be simple enough to apply (ie. it is limited to property which the company in liquidation holds a beneficial interest in to the extent of that interest). Thus, for example, a disposition of property held on trust will not in the ordinary course be subject to attack as a disposition unless of course the trust creditors are the ones claiming the money from the trustee insolvent company.

One area related to this topic which has been the subject of much academic and judicial comment is the issue of disposal by a receiver or a secured creditor of property of a company after that company has gone into liquidation. On the strict terms of s468, because there has been a disposition of the property of the company and because it is not listed as an exempt disposition (see below) the disposition should, technically, be void.

However, this would lead to an absurd situation where a secured creditor’s rights to realise security, whether by receiver or otherwise, would be severely inhibited merely because the mortgagor has gone into liquidation. The courts have tried to look at a few ways of rationalising such payments including finding that because the assets disposed of were secured by the charge and that the amount owed to the secured creditor exceeded the value of the company’s assets, the company itself had no beneficial interest in the assets disposed of. Hence it wasn’t a disposition of property of the company: Wily v Commonwealth of Australia (1996) 136 ALR 527. Other cases, albeit dealing primarily with unfair preferences, simply proceed on the basis that such a disposition by a receiver or secured creditor isn’t void under s468 because the secured creditor can stand outside winding up and the avoidance provisions (to the extent of its security) and therefore any payment made by the receiver is valid despite s468.

On either scenario, there does not seem to be any real suggestion by the courts that payments made by a receiver after the commencement of winding up are void under the terms of s468.

1.4 Exempt Disposition

Section 468(2) helpfully defines “exempt dispositions” for us. It provides:

[“exempt dispositions”] In subsection(1), exempt disposition, in relation to a company that has commenced to be wound up by the Court, means:

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4 Re Liverpool Civil Service Association (1874) 9 Ch App 511.
5 Re Fostoria-Fannon (Aust) Pty Ltd (1979) ACLC 32,277.
7 Mosaic Oil NL v Angari Pty Ltd (No 2) (1990) 20 NSWLR 280.
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(a) a disposition made by the liquidator, or by a provisional liquidator, of the company pursuant to a power conferred on him or her by:

(i) this Act; or
(ii) rules of the Court that appointed him or her; or
(iii) an order of the Court; or

(aa) a disposition made in good faith by, or with the consent of, an administrator of the company; or

(ab) a disposition under a deed of company arrangement executed by the company; or

(b) a payment of money by an Australian ADI out of an account maintained by the company with the Australian ADI, being a payment made by the Australian ADI:

(i) on or before the day on which the Court makes the order for the winding up of the company; and
(ii) in good faith and in the ordinary course of the banking business of the Australian ADI.

Section 468(2)(a) overcomes doubt cast by Re Timberland Ltd; Commissioner for Corporate Affairs v Harvey (1979) 4 ACLR 259 which questioned the ability of a liquidator to dispose of property of the company in apparent contravention of the void disposition provisions in the absence of an express or implied statutory power to do so.

Sections 468(2)(aa) and (ab) are self-explanatory, namely dispositions made either by or with the consent of an administrator or under a deed of company arrangement executed by the company under Part 5.3A.

Section 468(2)(b) requires some explanation. The term “Australian ADI” effectively means a bank. The provision provides that where a bank in good faith pays a third party in the course of its business (ie. honours a cheque) the bank is safe from attack. However, the section does not protect a bank which actually receives money itself (ie. to reduce an overdraft or repay a debt owed to it by the company), with the exception of where the bank is a secured creditor (see above) acting under its security.

1.5 Commencement of the Winding Up

As set out above, prior to the 1993 amendments to the Corporations Law (as it then was), the commencement of the winding up was the date of filing of the winding up application. However, a company is now taken to have begun or commenced winding up on the day when the Court ordered that the company be wound up and not when the winding up application was filed: s513A.

Consequently, the practical operation of s468 is severely limited. As a company the subject of a court ordered liquidation is under the control of the liquidator from the date of the winding up order there is little chance for a disposition of property by anyone other than the liquidator. In real terms, the application of s468 in respect of a court ordered winding up is limited to dispositions of property which is not physically under the control of the liquidator at the time of the winding up order.
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In respect of liquidation where a company has been under administration or subject to a deed of company arrangement, then generally the relevant day that the winding up began is the day on which the administration began, ie the day the administrator was appointed: see Macquarie Health Corporation (at 5.3 below). Again, this provision will mean little because s437D will treat the transaction or dealing as void in any event unless the administrator has entered into it or consented to it.

2. When will the court validate a disposition?

Section 468(3) provides:

[Court may validate certain dispositions] Notwithstanding subsection (1), the Court may, where an application for winding up has been filed but a winding up order has not been made, by order:

(a) validate the making, after the filing of the application, of a disposition of property of the company; or

(b) permit the business of the company or a portion of the business of the company to be carried on, and such acts as are incidental to the carrying on of the business or portion of the business to be done, during the period before a winding up order (if any) is made;

on such terms as it thinks fit.

Those of you who are quite observant will have noticed that there is something of anomaly in the introductory words to s468(3) namely: as I have just pointed out s468 now applies to dispositions after the date a winding up order has been made, and no longer applies to the period after an application for winding up has been filed but before a winding up order has been made. Yet the words at the beginning of s468(3) say that a court may validate certain dispositions made after the filing of the application (i.e not after the making of the order). It doesn’t really make any sense. It seems apparent that it is simply a drafting error when the legislation was put through.

One commentator (see Robson’s Annotated Corporations Act) says that s468(3) should be read as a “for avoidance of doubt” provision i.e that it allows applications for validation to be made even though the company is not yet to be put into liquidation. Another view is that the section also applies to dispositions after the making of the winding up order, which gives it more of a substantive effect. In any event, the validation provisions seem not to really attract the attention of the courts much any more, for the simple reason that s468 is much less relevant than it was.

To the extent that it remains relevant, in Tellsa Furniture Pty Ltd v Glendave Nominees Pty Ltd (1987) 5 ACLR 64 at 70-74, it was held that the power of the court to validate a disposition is a general judicial discretion which is to be exercised according to the following principles:

(a) the court will only make a validating order if the disposition assists in the company being sold as a going concern;

(b) the court will usually not make an order if the result is that unsecured creditors will not be paid pari passu;
(c) the court will usually not make an order if the disposition would be a preference;
(d) the court will usually not make an order to discharge an unsecured pre-liquidation debt;
(e) the court will usually make an order if the creditor was unaware a winding up application was presented. This only applies to bona fide payments made in “unawareness”, unless those payments are no more than reductions of pre-existing debt without any countervailing benefit to the company. Payments made in the ordinary course of business will usually be validated even if there was “awareness”;
(f) if the creditor might itself be forced into liquidation unless the payment is validated, and if the creditor made this known to the company at the time the consideration for the payment was obtained, the effect of validation on the creditor may be considered, although it is a minor consideration;
(g) the court should usually consider the entire course of dealing between creditor and company, and not examine the disposition in isolation.

Whilst there is a considerable body of judicial authority on how the discretionary power of the court under s468(1) is to be exercised, much of it is redundant now that the meaning of the “commencement of winding up” has changed.

3. Dealing with recovered dispositions

3.1 Void v Voidable

As stated earlier, a disposition made under the scope of s468 is “void”. By contrast standard preferences or uncommercial transactions, are “voidable”. In order to properly understand this, it is necessary to go back to the fundamental legal distinction between void and voidable. If a transaction is void, it means that it's of no effect whatsoever, never has been and never will be. On the other hand, if a transaction is voidable, for example an unfair preference or an uncommercial transaction, then it is legal, valid and binding unless and until it is actually set aside by a person alleging that it is voidable.

It's a fairly major distinction as under the common law only contracts which are illegal or seriously offend public policy are generally treated as void. Most contracts which are subject to rescission or termination are treated as voidable, that is they are valid and binding at least until they are actually set aside. If something is void, the law treats it as though it was never made, whereas if something is voidable, it was made and unless and until it is set aside, all the transactions forming part of that dealing are considered by the law to be valid.

In practice, however, it gets a bit confusing because the transaction entered into which is void is often treated by all parties as being valid unless and until a liquidator actually takes the point and moves to set it aside.

The esoteric distinction becomes important when looking at who is entitled to the benefit of recovered void dispositions.
3.2 Who is entitled to the money?

The situation sometimes arises where a liquidator has actually recovered a void disposition and the company is still subject to a mortgage debenture in favour of a secured creditor. As you would expect, the secured creditor (or its receiver) would often like to claim to be entitled to the money recovered on the basis that it is covered by its security over the company’s assets.

The question arises because virtually all well drafted mortgage debentures constitute a fixed and floating charge, which will purport to extend to cover not only present but also future property of the company. In theory, there is no reason why (subject to the cases set out below) the future property of the company could not include a void disposition recovered after a liquidation. There has been a great deal of academic debate as to whether or not void and voidable transactions should be available to a secured creditor or not. There are two (and possibly more) theories on this point.

Perhaps the best starting point is a decision of Bayley v National Australia Bank Limited (1995) 16 ACSR 38. Here a secured creditor held a fixed and floating charge over the assets of a company. The liquidator of that company recovered certain sums as void dispositions as well as some other money as voidable preferences.

The Court stated that because the dispositions were “void” (which meant that for all purposes the law treats the payment as never having happened), the sums which had been improperly disposed of after the commencement of liquidation remained the property of the company at all times and upon being restored to the company by the liquidator became subject to the secured creditor’s charge.

However, the leading case to consider the issue in detail was the Court of Appeal of the Supreme Court of South Australia in Campbell v Michael Mount PPB (1995) 65 SASR 334, which took a different view. Again, a secured creditor held a fixed and floating charge which purported to extend to present and future property of the company. A liquidator and a receiver were appointed to the company and the receiver purported to receive direct payment from a creditor of a void disposition.

The liquidator went to court claiming that the receiver wasn’t able to give a good discharge for those funds and commenced proceedings against the poor old confused creditor for payment of those funds a second time.

The court in the first instance effectively reached the same conclusion as in Bayley v National Australia Bank Limited in holding that because s468 of the Corporation Act did not state that a void disposition was recovered only at the instance of a liquidator (in contrast to the voidable transaction provisions), there was no reason to think that the void disposition was anything other than the property of the company at all times and hence that the secured creditor’s charge should attach to the proceeds of the void disposition.

The Court of Appeal (by a 2:1 majority) overturned that finding. While the reasoning is extremely complex, the essence of this decision is that the distinction between “void” and “voidable” does not answer the question because all of the avoidance provisions have the same aim: to allow rateable distribution among general creditors. The court found that the right to allege that a disposition is void rests with a liquidator, just as with a voidable
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transaction. On this rationale, the right to recover property disposed of in breach of s468 is not property of the company and the proceeds of such recovery action should not be caught by pre-existing mortgage debentures although specific property the subject of a charge will, if recovered, again be subject to that charge or security. On this reasoning, if a court orders the repayment of money as a void disposition, the secured creditor cannot touch it. On the other hand, if land or an identifiable chattel is revested in the company in liquidation, then that asset (assuming it was covered by the terms of the charge) will be available to the secured creditor.

Until the High Court considers this issue it is impossible to say definitely what the law in Australia is. If you had to make a choice, it seems safe to say that courts generally don’t like secured creditors taking the benefit of dispositions (whether they are void or voidable) which are intended by statute to be available to unsecured creditors, so it would seem more likely than not that the majority view in Campbell will be adopted by other courts.

4. Recent Developments

Because of the limited application of s468 nowadays, the recent cases only really seem to consider timing issues i.e when a disposition is made. The two set out below also handily deal with the last limb of s468, namely 468(4) which provides that:

[Avoidance of execution] Any attachment, sequestration, distress or execution put in force against the property of the company after the commencement of the winding up by the Court is void.

4.1 Blacktown Concrete Services Pty Ltd v Ultra Refurbishing & Construction Pty Ltd (in liq) (1998) 26 ACSR 759

The plaintiff obtained a default judgment against the defendant company. A garnishee order was served on the defendant’s bank in support of the judgment and the bank debited the amount of the garnishee order from the defendant’s account. The defendant gave notice of its intention to apply for the judgment to be set aside and the court ordered the bank to pay into court, subject to further order, the money deducted from the defendant’s account in support of the garnishee.

One year after the service of the garnishee order on the bank but before the moneys were paid out of court, the defendant was placed into administration. The administrators were subsequently appointed liquidators and requested the registrar of the court pay the money held in court to them as liquidators. The plaintiff sought that the money be released to it.

The liquidator of the defendant sought to prevent payment of the monies held in court to the plaintiff on the grounds that the payment by the bank into court was void pursuant to s468(4). The liquidator submitted that he should succeed because the liquidation had intervened before the proceeds were paid to the judgment creditor, even though the garnishee order was served prior to the commencement of winding up.

The court held that “[f]or the purpose of determining when attachment occurs and thus priorities, service is the critical time”. The court confirmed that the only right the judgment creditor obtains from the making of the garnishee order is a statutory right, which may be described as a lien conferring the right to prevent the garnishee from paying over the debt.
to the judgment debtor. The judgment creditor does not become a secured creditor. The garnishee order does not give the garnishor any property in the debt in the nature of a mortgage or lien.

Section 468(4) will not be applicable where the attachment (namely the service of the garnishee order) pre-dates the commencement of the winding up. Nor will there be a post winding up disposition of property, able to be rendered void under s468(1) because the garnishee is the disponor not the company presently in liquidation.

4.2 Commissioner of Taxation v Macquarie Health Corporation Ltd & Ors (1999) FCR 451 (first instance)

On 7 July 1992 the Commissioner served notices under s218 of the Income Tax Assessment Act 1936 (Cth) (the first notices) on four of the respondents (the debtors) for the unpaid taxes of Richard Walter Pty Ltd (the taxpayer). Several of the notices were subsequently amended and served on 29 September 1995 (the second notices). One of the second notices was again amended and served on 4 February 1997 (the third notice).

On 3 July 1996 the Commissioner filed an application for the winding up of the taxpayer. On 20 November 1996 an administrator was appointed to the taxpayer. On 28 February 1997 it was ordered that the administration end and that the taxpayer be wound up. Each order was stayed. On 10 March 1997 the winding up order took effect.

The debtors were ordered to pay the amount of the debts into court. The liquidator contended that the Commissioner should be treated as an unsecured creditor in respect of all tax and that the moneys should be paid out of court to him as liquidator of the taxpayer.

Since the taxpayer was taken to have commenced winding up on 20 November 1996, a question arose as to the effect of the third notice dated 4 February 1997. The liquidator argued that the giving of the third notice under s218 operated as a disposition of property by the taxpayer insofar as it created a charge affecting the property of the taxpayer.

Emmett J of the Federal Court held that s468(1) referred to a disposition “of the property of the company” not necessarily a disposition “by the company”. He therefore concluded that the service of the third notice after the commencement of the winding up of the taxpayer constituted a disposition of the property of the taxpayer to the extent that it created in favour of the Commissioner a charge or other right of priority over the property of the taxpayer in respect of the amount of tax specified in the notice. Accordingly, the third notice was held to be void.

Emmett J held that reference to an “attachment” in s468(4) was analogous with s118 of the Bankruptcy Act. It therefore followed, according to His Honour, that the enforcement of by the Commissioner of the obligations and rights created by the service of a notice under s218 did not entail putting into force an attachment against the property of a taxpayer which is a company within the meaning of s468(4). Therefore s468(4) did not invalidate the first or second notices.

Each of the first and second notices, which were served prior to the commencement of the winding up of the taxpayer, were upheld.
4.3 Macquarie Health Corporation Ltd v Federal Commissioner of Taxation (1999) 169 ALR 16 (appeal)

The liquidator and the taxpayer appealed from the decision of Emmett J to the Full Federal Court. Again, the liquidator and the taxpayer challenged the validity of all three notices and sought a declaration that the liquidator was entitled to collect and receive the debts to the exclusion of the Commissioner. The Commissioner cross-appealed as to the validity of the third notice. The issues considered by the Full Court were, inter alia, whether the commencement of the taxpayer’s winding up predated service of the third notice with the consequence that under s468 the third notice would be invalid and whether the first and second notices were invalidated in consequence of s468(4).

The Commissioner argued that the correct date of the commencement of winding up was 28 February 1997, being the date the taxpayer was ordered to be wound up. Hill, Sackville and Finn JJ jointly held that the winding up of the taxpayer was correctly determined by the primary judge to be 20 November 1996, the date when the taxpayer was placed into administration. As a result the third notice was held to be invalid as it was served after the commencement of the winding up of the taxpayer.

The liquidator submitted that Emmett J erred in finding that the term “attachment” in s486(4) did not encompass a statutory charge of the kind contemplated by s218. The liquidator argued that the first and second notices were “attachments” and were invalid under s468(4). The Full Court held that there was merit in the liquidator’s claim that the term “attachment” as used in s468(4) was not the same as that used in s118 of the Bankruptcy Act. The notices issued under s218 were held to be attachments for the purpose of s468(4).

However, the court held that a s218 notice was similar to a garnishee order and citing Blacktown Concrete Services held that the attachment was “put in force” when the notices were served on each of the debtors.

Therefore, the statutory charge created by the first and second notices was put in force at the time when the notices were served. Therefore the attachment was put in place prior to the commencement of the winding up and accordingly s468(4) was held not to invalidate the first or second notices.

The third notice, to the extent that it amended the first and second notices, was held to be void under s468(4) as it was served after the commencement of the winding up.

5. Summary

If all of the above can be summarised into a neat parcel, it would be something like this:

(a) void dispositions go hand in hand with voidable transactions to provide for an orderly, rateable division of an insolvent company’s assets among its creditors;

(b) since 1993, dispositions will usually only be void if they occurred after the date of liquidation. Transactions before that date must be attacked as voidable transactions;
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(c) a disposition by a receiver or secured creditor after liquidation is not generally a void disposition;

(d) the validation provisions for void dispositions don’t make a lot of sense and probably won’t get used much any more;

(e) a receiver or a secured creditor is not entitled to claim the benefit of a void disposition, unless it is a specific asset that has revested in the company;

(f) in terms of timing, the date of service of garnishee orders/s218 Income Tax notices is the relevant date when determining whether they are void or not under s468(4).