# WINDING UP BECAUSE ITS JUST AND EQUITABLE

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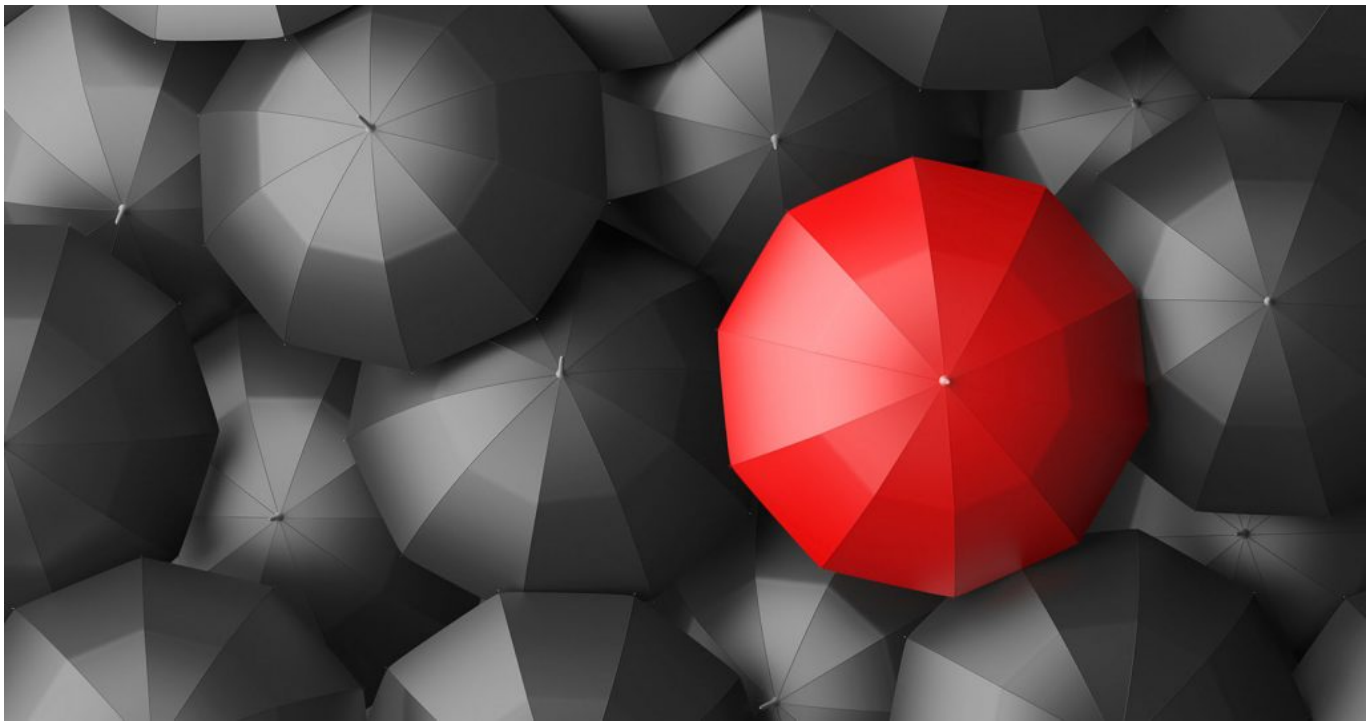

By Darrin Mitchell, Senior Associate at Matthews Folbigg in the Insolvency, Restructuring and Debt Recovery Group

In a dispute between directors of a corporate entity, one resolution can be to place to company into liquidation on "*just and equitable*" grounds.

Section 461(1)(k) of the *Corporations Act* 2001 (Cth)("the **Act**") makes provision for a court to wind up a company if the court is of the opinion that it is just and equitable to do so. Should an order be made to wind up the company, it is usual that the costs of the application be paid by the company as per section 466 of the Act and as was ordered in the matter of *Re Riverside Spares Pty Ltd* [2019] NSWSC 1900

However, discussions between the parties prior to the commencement of proceedings can have consequences with respect to costs if a party causes delay or loss.

We recently acted for a director of a company who was in dispute with his co-director and shareholder, primarily over the financial direction of the company. Prior to the commencement of proceedings, an agreement was made that the company be wound up, however, the other director failed to respond to the method. Ultimately, the threat was made that proceedings would be commenced to wind up the company and costs sought against the director personally. No response was received.

Proceedings were commenced in the Federal Court of Australia seeking various orders including the winding up of the company and costs. At the first return date the director sought an extension to file and serve evidence. At the second return date no evidence had been filed and we prepared to list the matter for hearing. The director then agreed to an order that the company be wound up and the court made that order appointing a liquidator. On the question of costs, the parties could not agree and so submissions were filed for the court to determine costs of the proceedings.

In a judgment recently issued by the court, Her Honour Justice Gleeson approved an order sought that the opposing director personally pay the costs of the proceedings noting:

"*On balance, I accept that the circumstances justify an order departing from the usual position provided for by s 466(2). By not proceeding with a voluntary winding up, Mr Oliveri caused the costs of the winding up proceeding to be incurred unnecessarily. In those circumstances, it is just that the costs of the winding up proceeding should be paid on an ordinary basis by him personally instead of from the assets of the company*".

So by his inaction, the director suffered an order that he personally pay the costs of the proceedings when six months earlier, he could have continued to participate in the negotiations and wound up the company at no personal cost.

The Court judgment can be found here

For information on the options available to persons or companies suffering financial pressure, contact the Insolvency, Restructuring and Debt Recovery team at Matthews Folbigg Lawyers.

If you would like more information or advice in relation to insolvency, restructuring or debt recovery practice and procedure, contact Darrin Mitchell on 02 9806 7428 or darrinm@matthewsfolbigg.com.au or a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

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