Winding Up Applications and the Extension of Time

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Section 459R(1) of the *Corporations Act* 2001 (Cth) ("**the Act**") requires that an application be filed to wind up a company, and for it to be determined within six months of filing. Should that six month period expire, the application can be dismissed without the orders sought being made.

However, there is provision for the six month period to be extended under section 459R(2) of the Act, if the applicant can satisfy the Court that special circumstances exist.

These time limits compare unfavourably with the *Bankruptcy Act* 1966 (Cth), which allows 12 months for an application for a sequestration order to be determined and the ability to extend the application for up to a further 12 months.

In the New South Wales Supreme Court, His Honour Justice Hamilton has said in relation to an application to extend time under section 459R of the Act:

"*What the Court must bear in mind in exercising its discretion is not simply the interests of the parties, but the public interest in what is established as the policy of this portion of the Act of ensuring that winding up proceedings are speedily disposed of*".

In a recent decision in the Supreme Court of Victoria, His Honour Associate Justice Randall was asked to determine an application for an extension of time on a winding up application. The facts on the application were that the winding up order was opposed, and after the filing of relevant evidence the application was listed for hearing. The hearing was held before His Honour who reserved judgment.

Some difficulty arose as the time limit for the determination of the application, under section 459R(1) of the Act, expired prior to the delivery of judgment. His Honour was asked to determine a further application that an extension of time be granted retrospectively. Failing the granting of an extension of time, the application would be dismissed.

The parties raised the question of the "slip rule" under the *Supreme Court (General Civil Procedure) Rules 2015 (Vic),* which allows for the correction of an order when there is an error arising from an accidental slip or omission. Justice Lockhart of the Federal Court's Court of Appeal has previously stated that the slip rule is "*ultimately to avoid injustice*".

As expected, the debtor company submitted to the Court that the slip rule should not be applied. Despite the debtor company's objection, His Honour stated:

"I am satisfied that I have the power under the slip rule to correct the orders of 2 March 2020 by inserting an order to extend time under s 459R. I am satisfied that the issue was not raised as a result of an accidental slip or omission by either the practitioners or the Court. I find that had the issue been raised before me on 2 March 2020, an application under s 459R(2) would have been made and … would have been granted".

Therefore, although requiring a winding up application to be determined within six months, there is provision for that time to be extended by a Court. In exceptional circumstances, such extension may be granted after the six month period has expired, although strict monitoring of relevant dates should be maintained so, if required, an extension can be sought without the necessity to rely on the Court's added discretionary consideration of granting the application retrospectively.

The above summary is designed to give practitioners an insight into some potential issues they may encounter when filing and completing a winding up application. Any specific advice on winding up applications can be discussed by contacting the team at Matthews Folbigg.

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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