# Unreasonable director related transactions: more power to liquidators

Last Updated: 29 April 2014
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The unreasonable director related transaction provisions in section 588FDA of the *Corporations Act* 2001 (Act) are among its most powerful, with long arms that can reach back years. Transactions that were entered into up to four years before the appointment of a liquidator can be set aside.

In 2013, the NSW Supreme Court decision of *Great Wall*[1] seemingly significantly reduced the usefulness of this section. In that case, Justice Brereton took the view that payments to companies could not be unwound, even if the miscreant director was the sole shareholder of the company which wrongfully received funds.

However, the recent Victorian Court of Appeal decision in *Vasudevan*[2] has corrected this situation. A court may take into account any benefit that a director receives, including a benefit as a shareholder of a company, when deciding to render void an unreasonable director related transaction.

Under section 588FDA of the Act, a transaction can be set aside if it is unreasonable and made to any of the following:

i. a director of the company; or
ii. a close associate of a director of the company; or
iii. a person on behalf of, or for the benefit of, a person mentioned in (i) and (ii) above.

In *Vasudevan*, the Court looked at the object of the section, which was 'to assist in the recovery of funds, assets and other property to companies in liquidation where the payments or transfers of property to directors are unreasonable.'

The Court then interpreted the meaning of the phrase '*for the benefit of*' more broadly than the interpretation adopted in Great Wall, and, in a unanimous decision, concluded that the provision is designed to catch a benefit which legally or financially advantages the director in question regardless of whether it is paid or directed to a close associate of the director.

Accordingly, a benefit to a company in which the director is a shareholder can now be considered a benefit for the purposes of the section.

The facts in *Vasudevan* provide a good example of the breadth of the meaning of "benefit". The director in question had entered into an arrangement with his personal creditor whereby the director's debts were to be forgiven upon the registration of a mortgage over land owned by one of his companies. The forgiveness of a debt and promise not to sue was considered a benefit within the meaning of the Act, and the transaction was set aside.

It is important to note at this point that courts have extremely broad powers to ensure that a company's assets are returned or transactions set aside. In circumstances where a court finds that a director related transaction was unreasonable, the court has the power to declare an agreement void or unenforceable, or to make orders against *any person* to do any of the following:

1. repay money;
2. transfer property back to the company; or

3. discharge a debt.[3]

However, a defence of good faith is available to third parties.[4] If someone received a benefit in good faith and had no grounds to suspect that the company was insolvent, then the Court must not make an order against that person. Of course, this will not protect the director, her husband or her family's trust fund because it is unlikely that those parties will be acting in good faith in circumstances where the court finds that the transaction was unreasonable.

**This decision has restored s588FDA as an effective weapon against the misuse of corporate structures. Liquidators are now in a better position to attack unreasonable-related transactions, and directors should be aware of the risks they face when entering into such transactions.**

Footnotes

[1]*In the matter of Great Wall Resources Pty Limited (in liq)* [2013] NSWSC 354
[2]*Vasudevan & Ors v Becon Const & Anor* [2014] VSCA
[3]Section 588FF of the Act.
[4]Section 588FG of the Act.