Inquiry into Liquidators and Administrators
Supplementary Submission – Item 10, Ark Space Liquidation

3 May 2010

Having recently received 'Report to Creditors' we wish to provide additional information to the Senate Inquiry into liquidators in the hope that the industry will be appropriately regulated to provide a fairer process for all concerned.

As stated in our original submission, Ark Space was a relatively new company which had made no sales, had no projects in progress or employees. The only major asset of Ark Space was a display house which was located on leased land. Ark Space was forced into liquidation due to a dispute between the original founding shareholders (two total directors Normoyle v Della Putta, four total shareholders). The company was not in financial difficulty.

We have read the IPA Code of Conduct for their members (our liquidator, BDO, is a member) and advise that there is little resemblance between the Code and the practice which we have experienced, specifically:

Independence

'The Practitioner must be independent of and be seen to be independent of each of the creditors, including the creditor who initiated the appointment.' (p.28) IPA Code.

In our case, the liquidator favoured the Normoyles (the creditors that initiated the appointment) as:

a) The Normoyles were advised of our final bid for the display house in order that they could increase their final bid to be marginally above our bid contrary to the stated terms of conditions of the on-line auction.

b) The Normoyles or their selected contractors were engaged (on an uncompetitive basis) to clear the display site including some costs which related to the removal of the display house and these costs were charged to the company. We were not given the same opportunity to arrange quotes to make good the site and, as far as we are aware, no alternative competitive quotes were obtained.

c) Valuable items which remained on the display site after the sale of the display house and which were the property of the company were permitted to be removed by the Normoyles. We were not given the same opportunity.

Communication

"Effective communication in insolvency is essential..." (IPA Code p. 43).

Our experience is that the liquidator communicates as little as possible specifically

a) The liquidator provided as little information as possible on the process in order to increase the number of telephone or email inquiries which, no matter how trivial, can be charged at an exorbitant rate. On many occasions the liquidator would be 'sick' or 'on holidays' or 'unavailable' in order to delay the process.

b) When we objected to the liquidator's claims for remuneration the liquidator engaged a solicitor (at the shareholders' expense) stating that we have 'a misunderstanding of the duties of a provision liquidator'. It is an absurd situation that the liquidators should engage solicitors at the shareholders' expense to justify their claims stating that the shareholders have a "misunderstanding of the duties of the provisional liquidator" when the IPA Code states that it is the liquidator's duty to communicate the process.

Timelines

"It is therefore important that the insolvency process is managed as quickly as is commercially and reasonably possible." (IPA Code, p. 46).

In our case:

a) The liquidation process was significantly delayed as, contrary to the conditions of sale that the display house 'be removed by the purchaser by 31 August 2008', the purchaser (Normoyles) were permitted to occupy the land for an additional 1.5 years. This significantly increased the cost of liquidation.

b) The reason the liquidator repeatedly gave for not being able to finalise the liquidation was that the bond on the leased land could not be released due to the Normoyles not relocating the display house in accordance with sales agreement. Yet the costs of the extensive delay plus site clearing (see 'Independence' (b)) were far in excess of the value of the bond.

c) Despite the display site being cleared in January 2010 and the bond being refunded in early March, the final report to creditors (which had been prepared for some time) was delayed a further month which we can conclude was to delay the release of report to creditors until after the Sydney Senate Inquiry on 13 April 2010.

Remuneration Principle

"The entitlement to remuneration exists only in respect of work that was necessary and was properly performed."

In our case:

a) The only substantial work required to liquidate the company was to arrange to sell the display house to the highest bidding shareholder yet, despite the liquidator being aware that we were prepared to bid substantially higher than an independent valuation which they commissioned, they proceeded with an ineffectual and uncompetitive sales campaign which significantly delayed the process and increased costs to shareholders.

b) Various third parties were engaged on uncompetitive or unnecessary basis at substantially above market value including the sales agent for sale of display house, the Normoyles or Normoyles' contractors to clear the site and legal advisers to dissuade us from objecting to the liquidator's claim for remuneration.

c) It is to our astonishment that we were able to liquidate Ark Living by agreement (a company which was in a similar situation to Ark Space) for $900 through our accountant while the Ark Space liquidation cost amounted to approximately $145,845 including approximately $55,000 claimed by the liquidator. This cannot possibly be due to additional statutory compliance costs alone.

In summary, our experience of the liquidation process does not resemble the IPA Code of Conduct for liquidators. Even though we repeatedly advised the IPA of irregularities in the process no action was taken and the IPA did not even respond to our formal written complaint. We can only conclude from this that the IPA is nothing more than a puppet of the liquidators and is ineffectual or reluctant to regulate the industry. From our experience we do not believe that ASIC or the IPA are appropriate bodies to regulate the industry.

Current government policy is facilitating a transfer of assets from company shareholders to uncompetitive liquidation companies who are not subject to normal market competition or scrutiny leaving shareholders with expensive legal action as the only option of redress.

The existing government policy is detrimental to business investment in Australian companies.

Some suggestions as to how the process could be improved and made fairer include:

1. Solicitors should not be permitted to recommend external administration as a means to resolve a company dispute without disclosing that shareholders stand to lose the value of any assets that the company holds in the process and solicitors' fees will be paid from the Company's assets as secured creditors. Mediation or adjudication is a more appropriate mechanism to resolve company director disputes.

2. Liquidators must only engage third parties on a competitive basis if it is required to facilitate the liquidation or is likely to increase the return to shareholders. Company directors, shareholders or third parties nominated by shareholders to perform work should be selected by the liquidators on a competitive basis with at least two fee proposals obtained for any services. Copies of all invoices from third parties should be provided as part of Report to Creditors.

3. Liquidator's claims for remuneration should be reviewed by an independent body at no cost to shareholders. The IPA and ASIC are not appropriate for this role and the legal system is a prohibitively expensive option to most shareholders (which the liquidators use to their advantage). An independent ombudsman could be appointed to oversee the process and although this would be at an additional cost to the community it is likely to be at significantly less cost than the inefficient and uncompetitive practises which currently exist and which discourages business investment.

4. Liquidators should not be permitted to use shareholders' funds to engage solicitors or any consultants in an attempt to justify their fees or dissuade disgruntled shareholders from objecting to their fees.

5. Many of the standard services that liquidators are required to perform should be at fixed scale of charges set by an independent ombudsman and hourly rates should only be used where no other system is possible.

6. The size of the liquidation company engaged should be compatible with the company to be liquidated, e.g. it is not appropriate to have an international liquidation company liquidate a company which never grossed more than $15,000 PA, as occurred in our case.