

Voidable Transactions – When does interest begin to accrue?

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Voidable transactions form a vital part of the insolvency regime and ensures that the assets of an insolvent company are made equally available to its creditors, particularly those that have been sought to be made unavailable in the period leading up to the insolvency. In effect, the regime affords creditors confidence that if anyone is aware of the impending insolvency and tries to better their position against other creditors of the insolvent company, there is a mechanism in place that allows liquidators to return and make the assets available for all creditors.

Once such assets are recovered, is a liquidator able to claim an additional amount on account of interest? The recent decision by the Federal Court in *Cooper as Liquidator of Runtong Investment and Development Pty Ltd (In Liq) v CEG Direct Securities Pty Ltd (Costs)*¹ looks at a liquidator's claim for interest on a transaction that was deemed voidable by the Court.

Background

The proceeding was brought by the liquidator of *Runtong Investment and Development Pty Ltd (Runtong)* against CEG Direct Securities Pty Ltd (**CEG**).

The proceedings centered around the following transaction:

- On 12 December 2014, Runtong executed a mortgage over a property in favour of CEG as part of a series of securities provided to CEG to secure borrowings by Runtong's related entities (due to common directorship). As at that date, the total borrowings by those entities were in excess of \$15 million.
- On 27 February 2018, CEG entered into possession of the subject property as mortgagee in possession.
- On 27 July 2018, CEG entered into a contract for the sale of the subject property. Upon settlement, CEG received the net amount of \$12,143,300.47.

The liquidator claimed that the mortgage executed by Runtong in favour of CEG (**Transaction**) was voidable as an unreasonable director-related transaction pursuant to s 588FDA of the Act. The Court found in favour of the liquidator and ordered CEG to pay an amount of \$1,983,100.40, which represented the benefit CEG received from the Transaction.

Interest Claimed – When Does Interest Start Accruing?

In a subsequent hearing, the Court was asked to consider the interest payable by CEG on account of the \$1.9 million recovered against it. In this regard, the liquidator sought an order that statutory interest be payable in the amount of \$605,513.90 pursuant to s51A of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), calculated from the date of the liquidator's appointment until the judgment date.

Section 51A(1) of the FCA Act relevantly states that the Court must, unless good cause is shown to the contrary, order pre-judgment interest on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date as of which judgment is entered

There was no dispute between the parties as to the rate of interest. Rather the dispute centered around the date on which interest should run.

CEG's position

The ordinary rule for relief claimed under s 588FF of the Act is that interest for a voided transaction should be allowed from the date of demand by the liquidators. CEG claimed that the ordinary rule should apply, such that interest should be calculated from the date of the liquidator's demand, namely 7 March 2019, or alternatively the date the claim was filed being 12 June 2019. In support of this position, CEG claimed:

- That a preference is void only as against the liquidator so that until a liquidator is appointed there can be no cause of action.
- As a matter of principle and logic, it was very difficult to see any proper basis for an award of interest in respect of a period prior to the accrual of any relevant cause of action.

¹ [2024] FCA 120.

- In the ordinary run of cases, it would not be proper to allow interest in respect of any period prior to a demand by the liquidator that any particular payment was in fact recoverable as a preference.
- A putative defendant to a liquidator's voidable transaction claim is entitled to know whether any particular action by the liquidator will in fact be pursued, including the basis on which the cause of action will be pursued. On this basis, pre-judgment interest pursuant to s 51A(1)(a) of the FCA Act should commence to run from the date when the proceeding was commenced.

The Liquidator's position

On the other hand, the liquidator claimed that making a demand was not a pre-requisite to a cause of action arising for the recovery of compensation for loss resulting from a voidable transaction claim. As a matter of convenience, interest should be allowed to run from the date of the liquidator's appointment.

The Court's decision

The Court accepted CEG's position and held that pre-judgment interest should run as from the date of demand, namely 7 March 2019. On that basis, the amount of interest accrued and payable by CEG was \$528,702.72. In coming to this decision, the Court noted the following:

- It does not matter what type of voidable transaction is claimed by the liquidator.
- The question for the purposes of s 51A(1)(a) of the FCA Act as to the start date for the calculation of pre-judgment interest is when the cause of action arose.
- In this instance, an action for recovery of an unreasonable director-related transaction is brought on the application of a company liquidator. It follows that until such time as a liquidator is appointed, no cause of action could arise.
- Turning to the facts of the case, it was an agreed fact at trial that CEG did not receive the \$1.9 million amount that was ultimately clawed back by the liquidator until 19 October 2018. On that basis, it was only from that date that any benefit to the company's creditors could be recovered by the liquidators. Notwithstanding this, the liquidators did not demand for the payment of such amounts until 7 March 2019.

Key Takeaways

The decision in *Cooper* affirms the ordinary rule that interest should be allowed from the date of the liquidator's demand on a voidable transaction claim. Depending on the size of the claim, recipients of a voidable transaction claim by a liquidator could face a significant interest claim on top of the principal amount sought.

Given the above, we recommend that any stakeholders facing a voidable transaction claim seek proper and prompt advice so as to mitigate the risk of any adverse findings and the additional, and potentially significant burden, liability on account of interest.

If you would like further information or require assistance with the matters set out in this article, please contact [Lesly Ann Cho](#), Partner, or your usual ClarkeKann contact.