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# TOP 10 INSOLVENCY CASES OF 2015

## Introduction

Lawyers are innumerate. It is a well-known fact. By December the list was a neat 10. Then judges got busy over the Christmas/New Year break and published in January those judgments that they had been keeping in reserve for their holidays. So the Top 10 cases are in fact the Top 13, but the original title is catchier so I have stuck with it.

2015 was an eventful year for jurisprudence in the area of insolvency. In a number of cases, judges usefully explored new ground while in other cases their industry has left practitioners somewhat bemused as we all thought the law was settled. As they say, 'The more things change...'

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# Coffs Harbour Catholic Recreation & Sporting Club Ltd [2015] NSW SC 1088

## Background

The company was a club registered under the **Registered Clubs Act 1976**. The directors purported to act under section 436A of the Corporations Act and appointed the Administrators as voluntary administrators. Shortly after the first meeting of creditors the Administrators gave thought as to whether approval was required by the Casino Liquor and Gaming Control Authority appointed under the Registered Clubs Act. The Administrators immediately contacted the club and ceased any activities they were required to do under the Corporations Act and adopted a caretaker role only. The Administrators did not take physical possession of the books and records of the club and in the absence of approval by the Authority neither Administrator purported to act on behalf of the club although the Administrators did contact creditors to alert them that their appointment was not valid.

The club closed the business and did not operate once the Administrators came to appreciate that they had not been validly appointed. The club approached the Supreme Court for an order appointing Administrators as voluntary administrators under the Registered Clubs Act and granting leave under section 448C of the Corporations Act to the Administrators to consent to be so appointed and to act as voluntary administrators and to act as administrators of any Deed of Company Arrangement should the creditors so resolve.

## Reasoning and outcome

The New South Wales Court of Appeal had previously determined that companies which are subject to the Registered Clubs Act are in a unique position when it comes to the voluntary administration scheme under the Corporations Act (**Correa v Whittingham** [2013] NSWCA 263).

Section 41 of the Registered Clubs Act provides that the person is not capable of being appointed to act in the capacity of the administrator of a registered club unless the person has been appointed to act in that capacity by the Supreme Court or approved to act in that capacity by the Casino Liquor and Gaming Control Authority. Section 41A of the Registered Clubs Act authorises the Authority to appoint a person to administer the affairs of a registered club. **Correa** stands for the proposition that approval by the Authority under section 41 must be granted **before** an appointment of an administrator under the Corporations Act. Without that prior approval the appointment of an administrator is invalid. Given the precise wording of section 41 it is not competent of the Authority to grant approval **after** the purported appointment of the administrator under the Corporations Act. **Correa** also stands for the proposition that section 447A of the Corporations Act, although wide in its application, is not without limit and the section cannot come to the aid of an administrator who did not have prior approval under the Registered Clubs Act. This is so because section 447A speaks of orders about how part 5.3A of the Corporations Act is to operate in relation to a particular company. The Registered Clubs Act is not a provision contained in part 5.3A. There is thus no power under section 447A of the Corporations Act to cure the invalidity of an administrator's appointment arising under section 41 of the Registered Clubs Act.

Given the particular needs and practical demands of the situation the Supreme Court was persuaded to exercise its power under section 41 of the Registered Clubs Act to appoint the Administrators as voluntary administrators of the club. The Court was mindful of the fact that if the Authority's approval had not been required the case would have been a proper one for the directors of the club to resolve to appoint administrators under the Corporations Act. The Court was satisfied as to the competency of the Administrators. The Administrators undertook to make no claim for the services provided by them as a result of the invalid appointment. The error made by the club and the Administrators in not obtaining approval in the first instance was not an error of such moment as to disqualify the Administrators from being appointed. In the premises, orders were granted appointing the Administrators.

# Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liquidation) [2015] HCA 48

## Background

Creditors of the company resolved that it be wound up under section 439C of the Corporations Act. The persons who had been appointed administrators were appointed the liquidators. The Liquidators caused the company to enter into a contract for the sale of real property which gave rise to a capital gain designated as a CGT event under the Income Tax Assessment Act. The capital proceeds were $4 million. The cost base for the property was about $2.9 million. The capital gain was approximately $1.1 million.

The Liquidators applied for a private ruling whether they had an obligation pursuant to section 254 of the **Income Tax Assessment Act 1936** to retain out of the proceeds of sale money sufficient to cover any capital gain tax liability from the time that the capital gain crystallised or only when an assessment had issued. They also sought a ruling on whether they were required to account to the Commissioner out of the proceeds of sale for any capital gains tax liability arising from the sale. The Commissioner ruled that under section 254 of the 1936 Act the Liquidators were required to retain monies for any capital gains tax liability out of the proceeds of sale from the time of the crystallisation of the capital gain and that they were required to account to the Commission for that liability out of the proceeds of sale. The Liquidators contested the ruling.

## Reasoning and outcome

Pursuant to section 254 of the 1936 Act an agent or trustee (which includes a liquidator, administrator or receiver) is obliged:

- in respect of profits (for example) to make the returns and be assessed thereon ('the assessment obligation');
- to retain from time to time out of the money which comes to him or her so much as is sufficient to pay tax **which is or will become due** in respect of the profit ('the retention obligation'); and
- to become personally liable for the tax payable in respect of the profit to the extent of any amount that he or she has retained or should have retained ('the taxation obligation').

The essential question for the High Court was whether the retention obligation is imposed on an agent or trustee before the Commissioner makes an assessment of the amount of tax payable on income or capital gains derived by that agent or trustee in his or her representative capacity or derived by the principal by virtue of his or her agency.

It was held that tax is 'due' when it is assessed and payable. Tax which is due is tax which has been assessed and which remains unpaid after it has become due for payment. Tax which will become due is tax which has been assessed but which is not yet due for payment.

The High Court noted the following in arriving at its conclusion:

- It fits within the structure of section 254 in giving the retention obligation an operation sequential to the performance of the assessment obligation. The content of the retention obligation is fixed by the assessment made in consequence of performance of the assessment obligation. The retention obligation then conforms to the taxation liability.
- It produces certainty as to the total amount which the agent or trustee is authorised and required to retain in performance of the retention obligation.
- It results in the lesser fiscal distortion of legitimate commercial choice between business models. A tax payer carrying on business alone is not ordinarily obliged to quarantine money as it is received for the future payment of tax.
- In its application to liquidators the courts conclusion as to the proper interpretation of section 254 minimises the potential for disharmony between the obligations and liabilities of the liquidator under that section and the obligations of the liquidator and the rights of creditors under Chapter 5 of the Corporations Act.

- If the court's construction of section 254 were not applied then an unfair and impracticable result would occur. The agent or trustee would be burdened with a continuing obligation to retain sufficient money to pay at any time the amount of tax that would be payable upon a notional assessment made at that time. Losses and deductions would have to be factored into avoid the agent or trustee exceeding the retention obligation. Linked to the continuing obligation would be a continuing and variable personal liability defined by reference to the difference between what the agent or trustee has retained and what would have been sufficient to pay the relevant tax at that time.

# Central Cleaning Supplies (Aust) Pty Ltd v Elkerton (in His Capacity as Joint and Several Liquidator of Swan Services Pty Ltd (In Liquidation)) [2015] VSCA 92

## Background

Between 2009 and 2013 Central supplied cleaning equipment to Swan. For each supply of equipment Central invoiced Swan. Each invoice included a retention of title ('ROT') clause. In mid 2013 Swan went into liquidation. Central sought to enforce the ROT clause. Central had not registered a security interest under the Personal Property Securities Act ('PPSA'). Its claim to recover goods could only succeed if its interest in the relevant equipment was covered by the transitional provisions of the PPSA which were designed to protect security interests which were created or provided for before the registration commencement time (30 January 2012).

In 2009 when relations began between Central and Swan, Central gave Swan a credit application form which was completed by Swan. The form referred to a 30 day commercial credit facility. The application form referred to the fact that the supply of equipment by Central would be governed by its standard terms and conditions as in force from time to time.

Having received the completed application form from Swan, Central began to supply equipment with each transaction being covered by a specific invoice and each invoice including the same ROT clause.

## Reasoning and outcome

It was noted by the Court that Central would only be able to enforce the ROT clause with respect to any item supplied after the commencement of the PPSA if the credit application was (or gave rise to) a transitional security agreement, that is, an agreement made before the registration commencement time **which provided for** the granting of the security interest in equipment when later supplied.

Under the PPSA a transitional security agreement means a security agreement that is in force immediately before the registration commencement time and which continues in force after that time. A transitional security interest means the security interest provided for by a transitional security agreement, if certain conditions are satisfied. Materially, one of those conditions is that in the case of a security interest arising at or after the registration commencement time, the transitional security agreement as in force immediately before the registration commencement time provides for the granting of the security interest and the Act applies in relation to the security interest.

The PPSA says that a security interest means an interest in personal property provided for by a transaction that in substance secures payment or performance of an obligation (section 12). A security interest thus includes a conditional sale agreement including an agreement to sell subject to an ROT clause (section 12(2)(d) of the PPSA).

Section 10 defines the security agreement to mean an agreement or act by which a security interest is created, arises or is provided for. The same section defines the word 'provides' to refer to a security agreement providing for a security interest if the interest arises under the agreement.

By application of these provisions, each contract between Central and Swan for the sale and supply of particular goods was an agreement to sell subject to retention of title. It was a transaction of the requisite character because in substance the retention of title by Central secured payment of the purchase price by Swan. Thus the interest in the goods provided by that transaction was a security interest within the meaning of section 12(1).

Although security interest is defined by reference to transactions a security agreement is not. The definition of a security agreement speaks of an agreement or an act by which a security interest is created arises or is provided for.

Thus a security interest may be found in the agreement or act itself and the entering into of the agreement or the doing of the act thereby creates the security interest.

An example of this would be a contract for the sale of goods which itself includes a retention of title clause. This was not the situation in the case of the relationship between Central and Swan. The question for the Court of Appeal was whether it could be said that there existed a security agreement which provided for a security interest, that is, whether the security agreement provided for the granting of the security interest at some time in the future. Accordingly the Court had to determine when and how the agreement between Central and Swan was made in order to determine whether it had the requisite provision.

Returning to the history of the relationship between the parties the Court observed that the credit application submitted by Swan was no more than an offer by Swan and the submission of it to Central did not of itself create a contractual obligation on the part of Central to do anything. The application was an offer by Swan to purchase goods from Central on an ongoing basis and to do so subject to Central's standard terms and conditions in force from time to time in return for the provision of 30 days credit. The Court held that supply by Central to Swan after the submission of the credit application constituted acceptance of the application for credit; the acceptance was acceptance by conduct. On this analysis the first supply of equipment operated to establish a supply agreement between Central and Swan. In accordance with the express terms of the credit application, the agreement covered all future supplies of goods. The supply of goods was to be subject to the standard terms and conditions in force from time to time. The ROT clause was one such clause. The result of the contractual analysis was that:

- Swan's application for credit included an undertaking to be bound by Central's standard terms of supply.
- The ROT clause was in existence as a standard term of supply.
- Under the agreement Swan accepted that all future supplies of equipment would be governed by that standard term.

Accordingly the agreement came into force at the time of the first supply of equipment (2009). The agreement did provide for the grant of a security interest in relation to all future supplies of equipment. The agreement was thus a transitional security agreement and each of the security interests granted in respect of goods supplied subsequently was a transitional security interest. Central was therefore able to enforce the ROT clause not withstanding the absence of registration.

# Fortress Credit Corporation (Australia) II Pty Limited v Fletcher [2015] HCA 10

## Background

Liquidators were appointed to the company. The relevant relation back day for the company was 3 October 2008. The time limited for commencement of proceedings under section 588FF(3)(a) of the Corporations Act was three years after the relation back day namely, 3 October 2011. In September 2011 the Liquidators of the company applied for an order that the time for applications under section 588FF(1) in relation to the company be extended from 3 October 2011 to 3 April 2012. The extension was couched in terms of a 'shelf' order, that is, the order for the extension of time did not specify the particular transaction or transactions to which it would apply. On 3 April 2012, acting pursuant to that extension, the Liquidators of the company commenced proceedings against Fortress.

The nub of the case was whether the extension of time that had been granted in which to bring the proceedings was effective.

The rationale for seeking an extension of time in terms of a shelf order is that it is not difficult to envisage a circumstance in which a liquidator is still ascertaining the identity of the recipients of benefits under possible voidable transactions and cannot give the court an indication of the creditors to be targeted.

The High Court held that the function of section 588FF(3)(b) to extend the time within which a company's liquidator may apply for orders in relation to voidable transactions entered into by the company is to confer a discretion on the court to mitigate, in an appropriate case, the rigours of the time limit imposed by section 588FF(3)(a). The underlying policy includes the avoidance of transactions by which an insolvent company has disposed of property in circumstances that are regarded by the legislature as unfair to the general body of secured creditors. That being the policy there is no justification to circumscribe the operation of the discretion such that the liquidator is obliged to identify a particular transaction or transactions when seeking an extension of time so as to give effect to the relevant underlying policy.

# Grant Samuel Corporate Finance Pty Limited v Fletcher; JP Morgan Chase Bank, National Association v Fletcher [2015] HCA 8

## Background

The relation back day in the case of the subject company was 4 June 2008. The effect of the period of limitation stated in section 588FF(3)(a) of the Corporations Act was to require an application under section 588FF(1) to be made by the liquidators of the company by 4 June 2011 unless a Court granted an extension of time under section 588FF(3)(b).

On 10 May 2011 the Liquidators sought an order extending the period within which they might bring proceedings under section 588FF(1) and on 30 May 2011 an order was made extending that period to 3 October 2011.

A further application was made within the period of the extension but after the three year period referred to in section 588FF(3)(a) had expired. On 19 September 2011 a Supreme Court judge made an order under the Uniform Civil Procedure Rues to vary the earlier extension order so as to permit the liquidators to bring an application under section 588FF(1) to 3 April 2012.

At issue was whether a Court on an application made outside the three year limitation period but within an extended period ordered under section 588FF(3)(b) could exercise power under the general rules governing that court to further extend the time for making an application under section 588FF(1).

## Reasoning and outcome

Section 79(1) of the **Judiciary Act 1903** (Cth) provides that all laws of each State or Territory, including the laws relating to procedure, shall except as otherwise provided by the constitution or the laws of the commonwealth be binding at all courts exercising Federal jurisdiction in that State or Territory.

The High Court held that section 588FF(3) 'otherwise provides' so that the relevant rule of the Uniform Civil Procedures Rules permitting variation of the extension order cannot apply.

In an earlier decision of the High Court, it had been obliged to deal with a situation where a liquidator had commenced proceedings within the statutory three year period but the defendant had not been served within the time permitted under the rules governing the court in which the proceedings were commenced. The rules of that court permitted an extension of time to effect service so as to avoid proceedings being dismissed. The High Court said in that case (**Gordon v Tolcher** (2006) 231 CLR 334) that the procedural regulation of a matter, after the institution of an application, is left to the State or Territory procedural law. Section 588FF(1) clearly did not 'otherwise provide' so as to deny the operation of section 79 of the Judiciary Act 'to pick up so much of the Rules as supported the orders made by the Court of Appeal' when it allowed the procedural rules to be applied thus keeping the proceedings alive.

What occurred in **Gordon v Tolcher** was, however, not the same as the issue confronting the Court in the present cases before it. Section 588FF(3) provides that an application under section 588FF(1) may only be made within the periods set out in paragraphs (a) and (b) of section 588FF(3). The phrase 'may only be made' should be read with both paragraphs. So understood, the term 'may only' has the effect of defining the jurisdiction of the court by imposing a requirement as to time as an essential condition of the right conferred by section 588FF(1) to bring proceedings for orders with respect to voidable transactions. An element of that right is that it must be exercised within the time specified. The only power given to a court to vary the period referred to in section 588FF(3)(a) is that provided by section 588FF(3)(b). That power may not be supplemented.

Accordingly the extension order made on 30 May 2011 was within power. As a result of that order, proceedings under section 588FF(1) could have been brought by 3 October 2011 but no further extension could be granted once the paragraph (a) period had elapsed. The NSW Uniform Civil Procedure Rules could not be utilised to further extend the time within which the proceedings under section 588FF(1) could be brought.

# Cardinal Group Pty Limited (In Liquidation) [2015] NSWCA 1761

## Background

Proceedings were commended by liquidators of the company under section 588FF of the Corporations Act. The proceedings were commenced within the time permitted under the Corporations Act. The proceedings were defended. Sometime later (and indeed after the period in which any application could be brought to extend time under section 588FF for the commencement of proceedings) the liquidators became aware of additional claims that they believed could be brought against the defendant.

At issue was whether the additional matters which the liquidators sought to be introduced into the pleading should be properly characterised as separate transactions from those already pleaded for the purpose of section 588FF(1)(1). The liquidators contended that they could make use of the Civil Procedure Act to amend their pleading to include the additional transactions and the defendant, naturally enough, responded by contending that the liquidators were out of time.

## Reasoning and outcome

In large measure the case turned on the meaning to be attributed to the notion of 'transaction' as referred to in section 588FF(1).

Relying upon authority (**Rodgers v Federal Commissioner of Taxation** (1998) 88 FCR 61) the Court noted that section 588FF(3) is concerned with the commencement of proceedings and was not inconsistent with the making of an amendment to a pleading to an existing proceeding. Materially, it is correct to say that each payment the subject of the proceedings was a separate transaction nonetheless additional claims arising from not dissimilar transactions arose out of substantially the same facts as those pleaded to support the original claim. The Court proceeded on the basis recognised in **Fortress Credit** and **Grant Samuel** that section 588FF(3) involves a statutory balancing of the competing interests of creditors and those who have dealt with the company and who might be subject to section 588FF(1) proceedings to limit the time within which such proceedings may be brought. The Court noted that that observation was directed to the bringing of an application which in the present case was brought within time in respect of dealings between the company and the defendant over an extended period. The application brought by the liquidators placed the defendant on notice that preference claims were made against it at least to the extent of those pleaded and potentially to the extent of any further claims that might be introduced by reason of further investigation, evidence or discovery, by the amendment process permitted by the Civil Procedure Act. Accordingly the focus on the fact that additional transactions had been discovered and were now sought to be included in the claim was misplaced. The claim for recovery of unfair preferences had been made within time. The rules of Court permitted amendment to that claim and such amendment was not (to use the language of section 79 of the Judiciary Act) otherwise provided for under section 588FF. In the result the amendment was permitted.

# Robinson and Reed Constructions Australia Pty Limited (In Liquidation) v J F K Interiors Australia Pty Limited [2015] FCA 1500

## Background

The Liquidator brought proceedings under section 588FF(1) and did so within the time permitted under section 588FF(3). Subsequently the Liquidator became aware of the fact that one of the defendants in the proceedings had been misdescribed. The Liquidator sought to amend the statement of claim so as to properly name the relevant defendant.

The evidence was that it had always been the intention of the Liquidator to commence proceedings against the party who was the creditor of the company, the party who had had the relevant contractual relationship with the company and who ultimately received the payments from the company. The mistake on the part of the Liquidator was to believe that the entity which had been named was the one who fulfilled these three criteria.

## Reasoning and outcome

The High Court had previously held (**Bridge Shipping Pty Limited v Grand Shipping S.A.** [1991] HCA 45)

> A plaintiff may make "a mistake in the name of a party" not only because the plaintiff mistakenly believes that a certain person, whom the plaintiff can otherwise identify, bears a certain name but also because the plaintiff mistakenly believes that a person who answers a particular description bears a certain name. Thus, a plaintiff may make a mistake "in the name of the party" because, although intending to sue a particular person whom the plaintiff knows by sight, the plaintiff is mistaken as to the person's name. Equally, the plaintiff may make a mistake "in the name of a party" because, although intending to sue a person whom the plaintiff knows by a particular description, e.g. the driver of a certain car, the plaintiff is mistaken as to the name of the person who answers to that description. In both cases, the plaintiff knows the person intended to be sued by reference to some property or properties which is or are peculiar to that person but is mistaken as to the name of that person.

In **Bridge Shipping** the plaintiff would have had rights if the person sued had been the carrier of certain goods; that was the relevant characteristic. The plaintiff, however, sued the owner of the ship in which the goods were carried. The lawyer for the plaintiff confirmed that the intention had been to preserve the plaintiff's rights against the owner of the ship. The plaintiff in **Bridge Shipping** had therefore made no mistake as to the description of the party which it wished to sue: it wished to sue the owner. The mistake which the plaintiff made in **Bridge Shipping** was that it believed that it had rights against the owner of the vessel but that was not a mistake 'in the name of the party'; the plaintiff's mistake was as to the characteristics of the person against whom it had rights, not as to identity.

Consistent with the formulation of principle in **Bridge Shipping** the rules of the Federal Court permitted the substitution of the misnamed party with the correctly named party. The next issue confronting the Liquidator was whether that amendment to the statement of claim could be made outside the time limit referred to in section 588FF(3). Consistent with what the High Court said in **Grant Samuel** (and previously in **Gordon v Tolcher**) the Court noted that section 588FF was enacted against the background of principles which had been developed at common law and rules of court concerning the effect of misnomer or mistake as to identify where an amendment to correct the mistake was made after the expiration of limitation period. Section 588FF should be construed against that background. **Bridge Shipping** was predicated on the proposition founded in common law that the correction the misnaming of an entity does not alter the substantive basis on which the proceedings were commenced.

The amendment having been made it took effect, pursuant to the rules of the Federal Court, from the date of the commencement of the proceedings and thus the liquidator was permitted to continue the action against the now correctly named party.

# 640 Elizabeth Street Pty Limited (In Liquidation) v Maxcon Pty Limited [2015] VSC 22

## Background

A company ('640') entered into a joint venture with another company as a result of which a special purpose corporate vehicle ('Elan') was appointed to develop some real estate. Elan entered into a building contract with Maxcon. At the end of the project Maxcon was informed that retention money which had been set aside had in fact been used to meet other liabilities of 640/Elan. Maxcon demanded that security be given for the debt that was due to it by Elan. The security was provided by 640. Subsequently 640 went into liquidation. The liquidators of 640 sought to set aside the security that had been granted to Maxcon. In the result the property which was the subject of the security was sold and the net proceeds of costs of sale were paid into an account pending a determination from the court as to who was entitled to the money.

At trial the liquidators of 640 claimed that the dealings that gave rise to the security (the 'Transaction') constituted an uncommercial transaction of 640 within the meaning of section 588FB of the Corporations Act. This was said to be the case on the basis that by entering into the Transaction and granting the security, 640 had suffered detriment in the nature of the liability to pay Elans debt relating to that company's dealings with Maxcon while Maxcon on the other hand derived the benefit of obtaining security to secure the payment of Elan's debt and suffered no detriment as a consequence of the Transaction.

Maxcon in part relied on a clause in the joint venture agreement whereby Elan was entitled to be indemnified out of the proceeds of sale of the property which was to be developed for any debt that it had to Maxcon. Accordingly, Maxcon submitted that neither 640 nor the other joint venturer was entitled to any money in the joint venture account until Elan's debt to Maxcon had been paid. It was also said by Maxcon that the Transaction had been attended to by it in good faith and in the absence of any reason to suspect 640's insolvency.

## Reasoning and outcome

The Court noted the following principles in applying section 588FB:

- It is an objective standard to determine if a transaction is uncommercial.
- Four criteria are to be considered:
  - the benefits enjoyed by the company,
  - the detriment to the company,
  - the respective benefits others received, and
  - any other relevant matter.
- The objective criteria are not considered in some vacuum but by reference to the company's circumstances which must include the state of knowledge of those who are the directing mind of the company.
- For a transaction to be uncommercial it must result in the recipient receiving a gift or obtaining a bargain of such magnitude that it cannot be explained by normal commercial practice where the consideration lacks a commercial quality.
- The decision of the New South Wales Court of Appeal in **Buzzle Operations Pty Limited (In Liquidation) v Apple Computer Australia Pty Limited (2011)** NSWLR 47 was held to have application. A transaction which has the effect of reducing the company's debts may nonetheless be an uncommercial transaction if it adversely affects the interests of other creditors. For example, in Buzzle, in making the payments which it did Buzzle reduced its debts to resellers however Buzzle had limited resources and to deprive itself of liquidity before it legally had to do so, where it had other pressing creditors and the need to expend monies on its business, amounted to a detriment. Detriment is not limited to a detriment that can be necessarily measured in monetary terms. In **Ashington Bayswater Pty Limited (In Liquidation)** [2013] NSWSC 1108 it was held that securing by a company of a

previously unsecured debt was an uncommercial transaction having regard to the disproportionate benefit received by the company from the transaction.

The single most material fact telling against the liquidators was that unless 640 entered into the Transaction with Maxcon it was, to use a general word, exposed. By avoiding any exposure to a direct or derivative claim or any exposure or risk to the diminution in the amount it would receive as a consequence to the development of the property, it undoubtedly benefited. Given the circumstances and the inextricable relationship between Elan and 640, 640 was undoubtedly exposed to a direct claim. 640 was both agent of Elan and its principal or beneficiary. Commercially speaking, any benefit to Elan was in the circumstances a benefit to 640.

The consequences of the grant of security and the position had the Transaction not been entered into, given the various provisions of the joint venture agreement, would have had substantially the same effect on 640. Its net position would have been the same. For example, receipts arising from the operation of the joint venture were required to be paid into an account. While beneficial ownership in the receipts resided with 640 and the other joint venturer, legal ownership remained with Elan and to this extent it could properly be regarded as trustee of the funds. As a trustee it was entitled to an indemnity in respect of a liability which it had incurred in its capacity as trustee. Moreover, a creditor of the trustee had derivative rights so as potentially to take advantage of the trustee's indemnity. In any event, even if there was no trust one way or another 640 was directly affected by amounts paid by Elan to Maxcon and so whether by the requirement to indemnify Elan or by the receipt of less funds 640's position would have remained the same.

In the result 640 did not impoverish itself for no or no adequate consideration. It did not make a gift and the transaction was not at under value. It either had to pay Elan or, pursuant to the Transaction, Maxcon.

Finally, the Court did not regard the effect of the Transaction on the rights of unsecured creditors as constituting a detriment to 640 because of the failure to adhere to the **pari passu** principle. All creditors of the 640 would participate equally in the monies that flowed to 640 as a result of the operation of the joint venture. The funds in the account never got back to 640 as an asset free of any burden or encumbrance. The entitlement that 640 had to those funds was always subject to the superior rights of Elan. Accordingly, when properly construed the events did not give rise to a destruction of the **pari passu** principle.

# Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd [2015] WASCA 95

## Background

The Creditor sold goods to a company (Newglen). The obligations and liabilities of Newglen were subject to a guarantee given by Dalesun. The guarantee was for existing debt and for debts arising in the future. The guarantee was supported by a charge which Dalesun gave over present and future property.

Administrators were appointed to Dalesun and thereafter creditors resolved to enter into a deed of company arrangement (DOCA). The Creditor had not been notified of the meeting. It did not attend even by proxy and it did not vote. The DOCA was entered into and in due course was effectuated. After the termination of Dalsun's DOCA, the Creditor supplied more goods to Newglen on credit. Newglen itself entered into a DOCA but the full amount that was due to the Creditor was not paid and so the Creditor looked to Dalesun pursuant to the guarantee.

## Reasoning and outcome

The Court noted the following:

- A deed of company arrangement binds all creditors of the company so far as concerns debts (or claims) arising on or before the date specified in the deed: section 4444D (1).
- Pursuant to section 444D(2) the deed does not prevent a secured creditor who did not vote in favour of the deed from realising or otherwise dealing with the security unless the Court so orders.
- Section 444D(2) does not however have the effect that a secured creditor is not bound by a deed of company arrangement.
- Section 444H provides that a deed of company arrangement releases the company from a debt only in so far as the deed provides for the release and the creditor concerned is bound by the deed.
- A secured creditor of a company has two rights. One is a proprietary right, that is, a right of action against the property of the company over which the security was granted. The second is a personal right against the company.
- Pursuant to the Dalesun DOCA, the date for the release of debts was the date of the appointment of the Administrators ('the release date').
- As at the release date, the Creditor had a contingent claim against Dalesun in respect of goods supplied to Newglen on credit but for which it had not been paid and for which a demand could be made under Dalesun's guarantee. Having given the guarantee, Dalesun was also then contingently liable in respect of goods supplied by the Creditor in the future to Newglen on credit, after the release date (the 'second category of contingent claims').
- The second category of contingent claims constituted claims within the meaning of the Dalesun DOCA and within the meaning of section 444D(1).
- As to the Creditor's personal rights, the Creditor's contingent claims under the guarantee were admissible to proof in accordance with the terms of the Dalesun DOCA. In that event, the value of any such claim would be estimated as at the release date. If the event or events upon which the Creditor's claims were contingent as at the release date occurred after that date in the course of the operation of the Dalesun DOCA, that fact would be admissible to show the value of the claim as at the release date for the purposes of proof.
- In relation to the proof of the second category of contingent claims, the value would be estimated having regard, amongst other things, as to whether the Creditor had an obligation to continue to supply goods on credit to Newglen in the future, and whether Newglen would likely call on that obligation to supply.
- As at the the release date, the Creditor's claims in both the first and second categories of contingent claim, were quantifiable.
- Relevantly, in the case of the second category of

contingent claim they were at least quantifiable at nil value (as there was no obligation to supply Newglen in the future). They were not of a character in respect of which the security rights preserved by section 444D(2) could be exercised.

- In its ordinary meaning, the effect of section 444D(1) and section 444(H), in relation to the Dalesun DOCA was to release these provable claims of the Creditor. While section 444D(2) preserves property rights, it says nothing about reinstating provable claims that have been released by the statutory effect given to the provisions of the deed of company arrangement.

# Bluenergy Group Ltd (Subject to a Deed of Company Arrangement) (Administrators Appointed) [2015] NSWSC 977

## Background

Bluenergy had borrowed money from and had provided a charge over its assets to Keybridge. The charge (or security interest) applied to all present and after acquired property of Bluenergy. Subsequently, Bluenergy went into administration and the creditors resolved that it should execute a Deed of Company Arrangement. Keybridge abstained from voting. After steps were taken to implement the DOCA, Keybridge purported to appoint a new administrator.

The deed administrators of the DOCA challenged the appointment of the administrator by Keybridge.

## Reasoning and outcome

The Court accepted that a second administrator may be appointed when a DOCA is current and furthermore that section 444D(2) of the Corporations Act preserves the right of a secured creditor (who did not vote in favour of the proposed DOCA) to make such an appointment. However, in the circumstances of this case and in particular given the terms of the DOCA the Court found that Keybridge was no longer a creditor of Bluenergy when it purported to appoint the new administrator. The Court drew heavily on a decision of the Western Australia Court of Appeal in **Australian Gypsum Industries Pty Limited v Dalesun Holdings Pty Limited** [2015] WASCA 95.

The DOCA provided that it was binding on all persons having a claim against the company to the extent of such claim. The word 'claim' was defined widely and there was no exclusion in the case of a secured creditor such as Keybridge. The DOCA went on to provide that as and from the commencement date for its operation it operated to release fully and irrevocably, and discharge Bluenergy from all claims. Finally, the DOCA provided that it did not prevent a secured creditor from realising or otherwise dealing with its security except to the extent that the secured creditor voted in favour of the resolution approving the DOCA or otherwise released it security.

The Court held that as a matter of construction the DOCA extinguished Keybridge's debt, subject to the preservation of its ability to realise or deal with its security, in respect of its proprietary interest in the secured property and to the extent that its debt was provable and secured assets were available at the date that its debt would otherwise be released under the DOCA.

To use the language of **Australian Gypsum**, insofar as a secured creditor has a claim against the company which is provable under the deed of company arrangement, but which is also capable of being satisfied by recourse to the security instead, the secured creditor is entitled to stand 'outside' the DOCA and realise or otherwise deal with the security under section 444D of the Corporations Act. The key however is that the right to stand 'outside' the DOCA is limited to the provable debt and, for that purpose, to the assets extant at the time that the release of the debt under the DOCA operated.

# Morton v Rexel Electrical Suppliers Pty Limited [2005] QDC 49; Rexel Electrical Suppliers Pty Limited v Morton [2015] QCA 235

## Background

(This case was first heard in the District Court of Queensland. The relevant issue in the case as far as this paper is concerned was not considered when the Queensland Court of Appeal entertained an appeal later in 2015.)

The liquidator sought to recover an amount which he contended constituted an unfair preference within the meaning of section 588FA. The amount claimed arose from several payments made by the company in liquidation to his creditor (Rexel). Rexel sought to set off a debt which remained owing to Rexel by the company in liquidation against the amount claimed as a preference.

## Reasoning and outcome

In the result, the court held that Rexel could set off part of the debt against the liquidator's unfair preference claim, the set off arising as a result of the application of section 553C of the Corporations Act.

Section 553C provides that where there have been mutual credits or mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company, an account has to be taken as to what is the balance admissible to proof or payable to the company as the case may be. A person is not entitled under this section to claim the benefit of the set off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.

Having determined that the claim to a preference was susceptible to a set off under section 553C the court focused on whether Rexel had notice of the fact that the company was insolvent at the relevant time. In considering this issue the court held that:

- Notice of the fact that the company was insolvent requires more than reasonable grounds for suspecting insolvency (the latter concept being the touchstone for considering if a creditor can succeed on a 'good faith' defence under section 588FG(2)).
- What must be considered for the purposes of section 553C is whether Rexel had notice of the fact of insolvency. A person might have reasonable grounds to suspect insolvency without having notice of the fact of insolvency.
- A person will have 'notice of the fact' that a company is insolvent if the person has actual notice of facts which disclose the company lacks the ability to pay its debts when they fall due. It is unnecessary to show that the person actually formed the view that the company lacked that ability.
- What was required – if the set off were to be defeated – was proof of facts known to Rexel which warranted the conclusion of insolvency. It was not enough that insolvency was a possible inference from the known facts.

## For more information, please contact:

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