HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY No. B19/2022

BETWEEN:

METAL MANUFACTURERS PTY LTD

(ACN 003 762 641)

Appellant

and

GAVIN MORTON as liquidator of MJ WOODMAN ELECTRICAL CONTRACTORS PTY LTD (IN LIQUIDATION)

(ACN 602 067 863)

First Respondent

MJ WOODMAN ELECTRICAL CONTRACTORS PTY LTD (IN LIQUIDATION)

(ACN 602 067 863)

Second Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION

1. This Reply is in a form suitable for publication on the internet.

PART II: REPLY

2. These submissions reply to the respondents' written submissions dated 27 July 2022 (**RS**). Those submissions expose an erroneous approach to the construction of s 553C; one in which the text of the statute is subordinated to *a priori* assumptions as to the outcome demanded by top down notions of *"fairness"* or *pari passu*. Such was the error of the Full Court below, and it is now urged upon this Court by the respondents.

Ground 1 - The Mutuality Issue

3. The central plank of the respondents' challenge to the application of s 553C is the concept of mutuality (**RS**[14]). The respondents' position is predicated upon the contention that the action for an order under s 588FF of the *Corporations Act 2001* (Cth) (**Corporations Act**) is *"the liquidator's claim"*, and thereby is **not** the claim of the company (see: **RS**[4]-[5], [fn.6], [9a], [14]). On that basis, it is said, there can be

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no reciprocity of claims between the company and creditor. This predicate, however, erects a false binary, from which the whole analysis of mutuality miscarries.

4. **Firstly**, whilst the liquidator may prosecute the action, they do so in their capacity as the **agent of the company**,[1] in order to swell the pool of assets available **to the company**. To speak of the action as *"the liquidator's claim"* overstates the liquidator's role, being no more than the *"procedural device"*[2] by which the claim is brought.

5. **Secondly**, the respondents' overemphasis upon the liquidator's role pays insufficient regard to the substance of the matter in favour of legal form; an approach disapproved of by Dixon J in ***Hiley*** *v Peoples Prudential Assurance Co Ltd* (1938) 60 CLR 468 at 497. As his Honour observed, it is the *"equitable or beneficial interest"* of the persons that must be considered, not merely the *"dry legal right"* asserted. Viewed through that prism, the order for recovery under s 588FF if the action is successful is one for payment *"to the company"*, and it is **the company** which thereafter holds the proceeds beneficially (see: **AS**[25]). The fact that the liquidator supplies the human agency by which this result is achieved is of no consequence to the characterisation of the claim.

6. **Thirdly**, that this process occurs within the broader statutory scheme has no transformative effect upon the proceeds; they remain the property of the company. Thus, the suggestion at **RS**[7], that *"any funds recovered [are to be] applied under statute for the benefit of creditors and those administrating the estate"* does not speak to the issue of whether it is the **company's claim** being pursued as a matter of substance. The submission also adopts an unrealistic picture of external administration, suggesting that the proceeds will flow into the hands of unsecured creditors in furtherance of the salutary goal of *"fairness"*. But the fruits of an unfair preference action may be utilised in a number of ways, depending on the application of the statutory order of priorities to the facts of the case. For instance, the funds may be used to meet expenses, including legal fees. They may satisfy the liquidator's claim for remuneration. They may be shared with funders. They may be applied to enable the business of the company to trade.[3] In this respect, preference recoveries are treated

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[1] A liquidator is the agent of the company: *Thomas Franklin & Sons Ltd v Cameron* (1935) 36 SR (NSW) 286 at 296 (Davidson J) quoted in *Linter Textiles Australia Ltd* (2005) 220 CLR 592 at 607. See also: *Commissioner for Corporate Affairs v Harvey* [1980] VR 669 at 695; *Re Harris Scarfe Ltd (In Liq)* [2006] SASC 277 at [29]; *Saraceni v Jones* (2012) 42 WAR 518 at [177].

[2] To adopt the description of Mansfield J in *Re Parker* (1997) 80 FCR 1 at 11.

[3] Corporations Act, s 477(1)(a) and 556(1). In fact, a liquidator is not obliged to incur any expense in relation to the winding up if there is insufficient property available to meet such expenses, see: s 545(1).

no differently to any other funds coming under the control of the liquidator on behalf of the company – whether funds sitting in pre-existing bank accounts, realised by sale of assets, recovered under debt or damages actions or otherwise.

7. **Fourthly**, the respondents' examination of the decisions in *Commissioner of Taxation (Cth) v* ***Linter Textiles*** *Australia Ltd* (2005) 220 CLR 592 (**RS**[20]-[21]) and *Cook v Italiano Family Fruit Company Pty Ltd* (2010) 190 FCR 474 at [42] (**RS**[28]-[30]) does not advance the relevant analysis, nor is there inconsistency between those decisions and *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2014) 87 NSWLR 728. It is now tolerably clear that the proceeds of an action to recover an unfair preference constitutes property of the company, and are not imbued with trust.[4]

8. **Fifthly**, the respondents assert that the absence of any *"provision allowing the application to be made…as the assignee of the liquidator's right"* (**RS**[6]) indicates that the claim is peculiarly that of the liquidator. That assertion is wrong. The power to assign causes of action conferred upon a liquidator (including preference recoveries) is contained within s 100-5(1) of the *Insolvency Practice Schedule (Corporations)* (**IPSC**).[5] Contrary to **RS**[6][fn6], the assignee may bring the claim in its own name, rather than the liquidator: ISPC, s 100-5(4).

9. The respondents also criticise the appellant's practical example of the set-off at **AS**[14], labelling it *"unfair and contrary to the pari passu principle"* (**RS**[35]). However, the respondents make no attempt to reconcile their invocation of these principles with the numerous exceptions to, or qualifications of, *pari passu* created by Parliament; nor do the respondents grapple with the proposition that set-off is a form of equity attaching to the company's claim, which is discharged by set-off.[6] Beyond these considerable difficulties, the principal problem with the respondents' contention at **RS**[35] is the approach it represents; it must be **the legislation** that governs, not the pursuit of perceived policy objectives, or notions of what *"fairness"* or the *pari passu* principle demands upon the application of the text of s 553C.[7]

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4 *Cook* at [42]; *Re Starkey* [1994] 1 Qd 142 at 154 (MacPherson JA); *Linter Textiles* at 612, 634. See also: *Ford & Austin's Principles of Corporations Law* (1995, 7th Ed) at 1013.

5 Corporations Act, Sch 2.

6 See: **AS**[9]; R.M. Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 1st Ed, 1990), at 68 (n 33).

7 See: **AS**[7].

10. The respondents are similarly unassisted by their examination (at **RS**[36]-[37]) of this Court's decision in *NA* ***Kratzmann*** *Pty Ltd v Tucker as Liquidator of Reid Murray Developments (Qld) Pty Ltd (No 2)* (1968) 123 CLR 297. In *Kratzmann*, payments totalling £47,300 were avoided as a preference, despite the creditor's entitlement to that amount. A question arose as to whether the creditor could prove for its *"original debt"* in the winding up before it repaid the amount avoided. The Court held (at 303) that the creditor was obliged to repay the preferred sum before proving for the original debt. However, as has been made clear in chief,[8] the appellant does not argue, nor did it below, that set-off would be available in circumstances of such circularity.

Ground 2 – Contingency of Claim

11. From **RS**[41], the respondents argue that the company's claim does not exist as a contingent claim at the relevant date. The respondents begin by accepting (without apparent challenge) the holding of Dixon J in *Hiley*, and the decision in ***Gye v McIntyre*** (1991) 171 CLR 609. The respondents, however, go on to contend at **RS**[45] that the operation of the statutory set-off *"requires a provable debt"* to exist **before** the relevant date. Yet neither the text of s 553C, nor authority, imposes this further restriction upon the operation of the statute. The examination must begin with the text of the section, which is expressed to operate *"where there have been mutual credits, mutual debts* ***or other mutual dealings****"* between the creditor and the company, which require the taking of the account described by s 553C(1)(a). Nothing in the text of the section supports the respondents' narrow construction that *"a provable debt"* must first be proven to exist before the relevant date. Moreover, the holding of Dixon J in *Hiley* provides a powerful and contrary exposition of principle (at 497).[9] In *Hiley*, his Honour observed that it was sufficient that there existed mutual dealings which *"involve"* absolute or contingent rights and obligations capable of maturation into pecuniary demands in the *"events that happen"*. Contrary to **RS**[49], whether there is *"nothing inherently wrong"* with the receipt of a payment by an unsecured creditor is immaterial. It remains the case that such receipt arises through mutual dealings and is the ultimate genesis of an order under s 588FF for disgorgement of the preferred sum.

12. Turning to authority, the respondents do not meaningfully engage with those upon which the appellant relies, seeking instead at **RS**[55]-[60] to distinguish them.

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[8] See: **AS**[8];[fn4].

[9] See: **AS**[18].

However, a proper examination of each of those authorities, and in particular the detailed analyses of Mansfield J in *Re Parker* (1997) 80 FCR 1 and Hodgson J in *Shirlaw v Lewis* (1993) 10 ACSR 288, supports the appellant's contentions in respect of the existence of the requisite mutuality and contingency for the purpose of s 553C. The respondents do, however, emphasise select decisions in which Courts are said to have *"seriously questioned"* the availability of set-off in *obiter*.[10] Importantly, however, **none** of the authorities cited by the respondents decided the issue, nor were they reached following full argument. Thus in *Hussain v CSR Building Products Pty Ltd* (2016) 112 ACSR 507 Edelman J declined to reach a final view, on the basis that the matter was not fully argued.[11] And in *Re Force Corp* (2020) 149 ACSR 451, Gleeson J, again without final decision[12] suggested that an *"essential reason"* for denying the application of s 553C was that the *"preference is not provable in the liquidation until the preference is paid back in full"*.[13] That analysis speaks to the situation of circularity. It does not explicate why in cases of entirely separate and independent debts (not subject to s 588FI) s 553C should be unavailable to a creditor.

Ground 3 – Harmer Report

13. Contrary to **RS**[62], the Commission proposed a structure for s 553C(2) in which the exclusion of a creditor's *"defence"* under s 588FG(2) would also exclude the possibility of any set-off.[14] That is, establishing liability for an unfair preference would also foreclose the possibility of the creditor relying upon set-off under s 553C. Yet, Parliament did not embrace that proposal, instead leaving open the prospect of set-off applying in the circumstances such as the present.

Dated: 17 August 2022

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[10] **RS**[71]-[72].
[11] At 550 ([236]).
[12] At 475[98].
[13] At 474 ([94]). Ultimately no decision was necessary or reached on the argument: at 475[98].
[14] See: **AS**[40]-[42].