HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

John Maxwell Morgan
First Appellant

Sydney Allen Printers Pty Ltd (In Liquidation)
Second Appellant

Sydney Allen Manufacturing Pty Ltd (In Liquidation)
Third Appellant

and

McMillan Investment Holdings Pty Ltd
First Respondent

Australian Securities and Investments Commission
Second Respondent

APPELLANTS' SUBMISSIONS

Part I: These submissions are in a form suitable for publication on the internet.

Part II: This appeal concerns the questions whether:

(a) upon reinstatement of a company pursuant to section 601AH of the *Corporations Act 2001* (Cth) (***Corporations Act***), property owned by that company prior to deregistration which was jointly owned with another company; and

(b) a chose in action to recover part of the proceeds of the sale of the business and the assets of a group of companies is "particular property" which satisfies the precondition in s 579E(1)(b)(iv) of the *Corporations Act*,

can be "particular property" which satisfies the precondition in s 579E(1)(b)(iv) of the *Corporations Act* such that those companies can be pooled.

Part III: No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: The judgment appealed from is *McMillan Investment Holdings Pty Ltd v Morgan* [2023] FCAFC 9 (**FC**). The judgment of the primary judge is *Morgan v Sydney Allen Manufacturing Pty Limited (In Liquidation)* [2021] FCA 1669 (**PJ**).

Part V: Factual background

1. The First Appellant, John Maxwell Morgan (**Liquidator**), is the liquidator of the Second and Third Appellants, Sydney Allen Printers Pty Ltd (in liquidation) (**SAP**) and Sydney Allen Manufacturing Pty Ltd (in liquidation) (**SAM**).

2. The Liquidator sought a number of orders before the primary judge (Rares J), including that the Australian Securities and Investments Commission (**ASIC**) reinstate the registration of SAM, and that the Court make a pooling order, pursuant to s 579E of the *Corporations Act* in respect of SAM and SAP.

3. The relevant background facts are not in dispute, and were summarised on appeal by Yates J (at **FC [7] – [25], CAB [49] – [51]**). Relevantly:

   (a) Prior to 2013, SAP and SAM operated a colour printing business. SAM owned, or had rights over, expensive and substantial printing presses. It had also provided security over certain of its assets. The security included security for credit facilities which certain suppliers of materials had provided.

   (b) The business operated on the basis that, while SAM owned the equipment used in the business, SAP undertook the printing. SAP ordered supplies for the business using the credit facilities that SAM had created, and paid suppliers. The internal accounts between SAP and SAM included entries under which, notionally, SAP paid the creditors on behalf of SAM. SAM did not receive any, or any sufficient, remuneration or return from SAP for providing the machinery and credit facilities which enabled SAP to conduct the business – however, the two companies' accounting records showed that, as at 7 April 2016, SAM owed SAP over $1 million.

(c) The Respondent, McMillan Investment Holdings Pty Ltd (**MIH**) became involved with SAM and SAP in 2014 by providing finance, or some form of financial accommodation, to the companies. The Liquidator has alleged that the principals of MIH, Robert Ian McMillan (**Mr McMillan**) and Julie-Anne McMillan (**Ms McMillan**) became shadow directors of SAP and SAM.

(d) On 27 March 2015, MIH, SAP, and SAM entered into a finance facility (**MIH facility**) under which SAP and SAM were described as "the borrower". Clause 3.6 of the MIH facility was to the effect that SAP and SAM were jointly liable for all amounts due in respect of the "secured money", representing the "principal money" and all interest accrued on the principal money but which has not been added to it.

(e) On 7 April 2016, the Liquidator and Geoffrey Davis (**Mr Davis**) were appointed as joint and several administrators of SAP, and as joint and several liquidators of SAM.

(f) On 13 April 2016, MIH appointed Anthony John Warner (**Mr Warner**) as receiver and manager to SAP under the MIH facility, and on 2 May 2016, appointed Mr Warner as receiver and manager of SAM (also under the MIH facility).

(g) On 4 May 2016, Mr Warner, SAP, and SAM entered into an agreement with Print Warehouse Australia Pty Limited (**Print Warehouse**) to sell, as a going concern, the assets and business operated by SAP and SAM, for the stated purchase price of $1.3 million (**Sale Agreement**). The Sale Agreement described the purchase price as GST exempt because the business was being sold as a going concern. The commencement of the agreement was 5 May 2016, with completion to take place eight weeks after the payment of a deposit. The Sale Agreement did not allocate the purchase price as between SAP and SAM.

(h) In a letter dated 4 July 2016, MIH's legal representative informed Mr Warner that the purchase price originally offered by Print Warehouse had been "reduced at the last minute" and that "the McMillans agreed to the reduced purchase price".

(i) However, on 4 May 2016, McMillan Group Services Pty Limited (**MGS**), an associated company of MIH or Mr and Ms McMillan, issued an invoice to

Print Warehouse for the sum of $330,000 ($300,000 plus GST of $30,000), with the description being "*To our costs in relation to services provided in connection with printing plant and equipment*."

(j) The primary judge referred to this as a "curious invoice" and noted that, although a party to the proceeding before him, MIH had given no evidence in relation to the invoice and no evidence of any dealing to which the invoice could relate.

(k) On 5 May 2016, Print Warehouse paid the invoiced sum to MGS (**Diverted Proceeds**). It is the Liquidator's case that MGS did not provide any services to MGS and that the amount paid to MGS was, in truth, "an asset of one or both of" SAP and SAM, which had been diverted, improperly, from SAP and SAM. The Liquidator seeks on behalf of SAM and SAP to recover this sum from MGS, Mr McMillan, and Ms McMillan (and has commenced proceedings seeking that relief).

(l) On 13 May 2016, at a second meeting of creditors, the Liquidator and Mr Davis were appointed as liquidators of SAP. On 14 February 2020, Mr Davis retired as a liquidator of SAP.

(m) On 5 April 2018, Mr Davis (while still a liquidator of SAM), lodged a Form 578 request with ASIC seeking that SAM be deregistered on the basis that there were "*no funds left in the creditors' voluntary liquidation to hold a final meeting and also the affairs of the company are fully wound up*."

(n) ASIC deregistered SAM on 10 June 2018. As a consequence of deregistration, SAM ceased to exist and all its property (other than property held by it on trust) vested in ASIC, pursuant to s 601AD(1) and (2) of the *Corporations Act*. Any property held by SAM on trust vested in the Commonwealth: s 601AD(1A) of the *Corporations Act*.

4. Beach J found at **FC [147]** (**CAB [73] – [74]**) that "*After the completion of the sale of the businesses, SAM did nothing. SAM recovered no debts. There were no receipts or payments in SAM's liquidation from 7 April 2016 to 7 April 2017 according to the creditors report issued on 11 May 2017. And no further creditors reports were issued by SAM's liquidators until its affairs were fully wound up on 5 April 2018. Further, SAM had ceased trading three years before it was placed into liquidation. And once in liquidation, SAM had no funding, no assets and no prospects of recovery prior to*

its deregistration. On 5 April 2018, the SAM liquidators requested that ASIC deregister SAM as its affairs were fully wound up."

5. In this context, the primary judge relevantly made orders that ASIC reinstate the registration of SAM, and that SAM and SAP be a pooled group for the purpose of s 579E of the *Corporations Act*.

6. MIH appealed to the Full Court. Although that appeal was initially against the whole of the orders made by the Court below, the appeal was ultimately confined to the question of whether or not the pooling order should be set aside.

7. Central to that question before the Full Court was the claim made by the Appellants in respect of the Diverted Funds, which the Appellants contended were moneys to which SAM and SAP were entitled.

8. It was common ground below that the relevant chose in action arose upon sale of the printing business, and that at that time, SAM and SAP were deprived of part of the purchase price which gave rise to a cause of action for the recovery of that amount (**FC [241], CAB [98]**).

9. That fact assumed importance both in consideration of whether that chose in action was "particular property" for the purpose of s 579E(1)(b)(iv) of the *Corporations Act*, and if so, whether that chose in action, *is* or *was used*, or *for use*, by SAP and/or SAM in connection with a business, scheme or undertaking carried on jointly by them.

Part VI: Argument

10. For the reasons which follow, the majority of the Full Court erred in:

(a) concluding that the cause of action held by SAP did not arise until completion of the sale on about 1 July 2016, where it was not in dispute that the date of the Sale Agreement was 4 May 2016, and that the Diverted Proceeds were paid to MGS on 5 May 2016 (**FC [148]** (**CAB [74]**));

(b) finding that the precondition in section 579E(1)(b)(iv) of the *Corporations Act* was not satisfied in circumstances where SAP and SAM jointly and severally owned "particular property", being a chose in action, at the time of making of the pooling order, being immediately following the reinstatement of SAM; and

(c) departing impermissibly from the clear and unambiguous language of section 601AH(5) of the *Corporations Act* (**FC [75]** and **[150]** (**CAB [60]** and **[74]**)).

Ground 3

11. The conclusion reached by Beach J at **FC [148]** (**CAB [74]**) was contrary both to the uncontested facts, and the law. As noted above, it was common ground that the relevant chose in action arose upon sale of the printing business, and that at that time, SAM and SAP were deprived of part of the purchase price which gave rise to a cause of action for the recovery of that amount.

12. A cause of action encompasses every material fact that is necessary to be proved to entitle the plaintiff to sue: *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581 (Sackville J). As Ward J (as the President of the Court of Appeal then was) said in *Nu Line Construction Group Pty Ltd v Fowler (aka Grippaudo)* [2012] NSWSC 587 at [277], *"*[a] *cause of action accrues only when all the material facts have occurred."* In this context, where the Diverted Proceeds were paid on 5 May 2016, that was the date on which the material facts to the claim for repayment of those moneys were known – there was nothing else which occurred later, or which could have occurred later, required to advance a claim for repayment of those moneys.

13. It follows that Beach J was incorrect to conclude that at the time the chose in action arose, both SAP and SAM were in liquidation (SAP not being in liquidation until 13 May 2016). That in turn led to a conclusion (unsupported by authority) that it was legally impossible that SAP and SAM could conduct a single business after 1 July 2016 (the date the sale completed). That proposition, which has potential application beyond pooling applications is plainly incorrect. There is no reason in principle why a company in liquidation (or two companies in liquidation) cannot conduct a business jointly, particularly in light of the express power in section 477(1) of the *Corporations Act* permitting a liquidator to carry on the business of the company in liquidation if that is required *"for the beneficial disposal or winding up of that business"*.

14. Even if, contrary to the foregoing submissions, the cause of action did accrue on the date of completion (and not the date the Diverted Proceeds were paid), this would not lead to a conclusion that the majority were correct. Rather, and as addressed below,

the focus on the date on which the cause of action accrued by Beach J elides two distinct concepts – first, that liquidations are, absent a pooling order, conducted separately, and secondly, that the first proposition does not preclude the joint operation of a business by two separate companies in liquidation.

Ground 1

15. The starting point is to consider whether the chose in action (being the property relied upon by the Appellants in seeking a pooling order) was "particular property" for the purpose of s 579E(1)(b)(iv) of the *Corporations Act*.

16. That chose in action arose from the sale of the printing business. The Liquidator's position is that part of the purchase price from that sale was (and remains) unpaid by MGS. There was no dispute on appeal that SAP and/or SAM owned the particular property at the time the primary judge made orders, as required by s 579E(1)(b)(iv), and that they continue to do so (at **FC [236]** (**CAB [97]**)).

17. The question was whether that chose in action, as "particular property", is or was used, or for use, by SAP and/or SAM in connection with a business, scheme or undertaking carried on by them.

18. As Markovic J observed in her Honour's dissenting judgment (**FC [238] (CAB [98]**)), those are alternatives, and the Court must be satisfied that the particular property which is presently owned by SAP and/or SAM is used or was used or is for use by them in connection with their joint business, scheme or undertaking.

19. It was the Appellants' case below, and which forms the basis of this appeal, that the business, scheme or undertaking carried on jointly by SAP and SAM did not cease upon sale of the printing business. Rather, its nature changed from one of actively carrying on a business to one of recovery and payment of debts.

20. Markovic J observed, with respect correctly, at **FC [244]** (**CAB [99]**) that a company might carry on business in the sense of winding up its affairs or collecting debts, and that "*given that a pooling order is sought in circumstances where each company in the relevant group is being wound up it must be the case that in many instances the business, scheme or undertaking will, at the time the requirements for the making of a pooling order are considered, be at the stage described in the authorities referred to in Donoghue*". (That latter reference being a reference to *Donoghue v Russells (A*

Firm) [2021] FCA 798, in which Rangiah J considered the meaning of the term "carrying on business in Australia" in the context of s 43(1)(b)(iii) of the *Bankruptcy Act 1966* (Cth)).

21. The reasons of the majority did not grapple with this proposition.

22. In this context, the statement of Yates J that this case was not put to the primary judge is not correct (**FC [73]** (**CAB [60]**). The written submissions to which his Honour refers were opening submissions. The submissions as finally made included this point (as is evident from their being recorded by the primary judge at **PJ 79** (**CAB [29]**). It is also consistent with the submission that each of SAM and SAP "contributed to a business, scheme or undertaking carried on jointly by all of them, being a full colour printing business from shared premises, with shared plant, equipment and staff, and shared financial arrangements" to say that recovering money owed was part of that business. As Rangiah J observed in *Donoghue* at [45], by reference to earlier authority, "*a person carries on business during the process of a business being wound up and repaying its debts, even though the business has ceased to actually trade*." It was not a "new case raised for the first time on appeal". In any event no point was taken and it was fully argued.

23. Nor, with respect, can the conclusion of Yates J that "*there [was] no evidence to support the contention that, after the sale of the colour printing business, and in the course of (a) SAP's administration and then winding up, and (b) SAM's winding up, SAP and SAM jointly carried on the activity of recovering assets of the colour printing business*" be able to be sustained – if only because by the very proceedings which were before the primary judge, that is precisely the outcome which was being sought (and by the time of the appeal the recovery proceedings had been commenced).

24. Similar difficulties confront the reasons of Beach J. In holding (at **FC [140]** (**CAB [72]**)) that the primary judge was "*incorrect to characterise the SAP and SAM then liquidators' steps to get in moneys in SAP's and SAM's liquidations, in accordance with their statutory duties, by making a claim for the $330,000 payment arising out of the completed sale of their businesses, as the joint carrying on of a business, scheme or undertaking in SAP's and SAM's insolvency administrations*", his Honour did not appear to consider the effects first, of the authorities to which Markovic J

referred at **FC [243]** (**CAB [98] – [99]**), and in particular, that the business of a company can continue in recovering moneys owing to them.

25. It was, as set out above, common ground that the relevant chose in action arose upon sale of the printing business. At that time, SAM and SAP were deprived of part of the purchase price which gave rise to a cause of action for the recovery of that amount. The chose in action was thus one held jointly by SAM and SAP (and that the liquidator was appointed and caused those companies to take steps to get in that joint debt does not alter that analysis).

26. Nor does the fact that, until SAM was deregistered, the liquidations of SAP and SAM were carried on separately support his Honour's conclusion. The very purpose of s 579E is to pool liquidations which were carried on separately (as they must be absent pooling). In particular, that separate liquidations were carried on does not detract from the fact that there was a joint chose in action which existed at that time.

27. As Barrett J (as his Honour then was) said in *Re Lombe* [2011] NSWSC 1536; 87 ACSR 84 at [44], "*[b]oth s 579E(1)(b)(iii) and (iv) deal with a case where property "is or was used, or for use" in connection with a business, scheme or undertaking, thus extending to both a case in which property is now used (or for use) and a case in which property was at some earlier time used (or for use); but each provision makes it perfectly plain that it is concerned only with property that is now owned*." As his Honour later observed in *Re Lombe* at [58], there is nothing in s 579E(1)(b)(iv) of the *Corporations Act* to confine the application of that section to tangible property – and as in *Re Lombe*, here, the relevant property was a chose in action jointly held by two companies.

28. For these reasons, Yates and Beach JJ were, with respect, incorrect in holding that the chose in action, to recover the balance of the purchase price from MGS, was not and could not for the purpose of s 579E(1)(b)(iv) be "particular property."

29. Nor, with respect, are the reasons of Yates and Beach JJ consistent with the clear terms of s 601AH(5) of the *Corporations Act*. If the reasoning of the majority were accepted, then it would follow that a liquidator could never pool companies where one of the companies to be pooled was required to be reinstated, as the effect of the reasons of the majority were that any joint business, scheme or undertaking was severed, and the deeming provisions in section 601AH(5) of the *Corporations Act*

are ignored. "Simultaneous" reinstatement and pooling orders have been made (for example, *Hathway, in the matter of Stacey Apartments (in liq) v Southern Cross Estate Developers Pty Ltd (deregistered)* [2019] FCA 2018).

Ground 2

30. The effect of section 601AH(5) of the *Corporations Act* was either not addressed in terms by the majority (Yates J at **FC [75]** (**CAB [60]**)) or departed from the clear and unambiguous language of the section (Beach J at **FC [150]** (**CAB [74]**)).

31. As Meagher JA (with whom White JA and Simpson AJA agreed) observed in *Allianz Australia Insurance v Viksne* (2021) 106 NSWLR 306 at 316, section 601AH(5) of the *Corporations Act*, "*by its use of the expression "is taken to have", deems the reinstated company to have "continued in existence", contrary to the fact. It thereby creates a statutory fiction which countermands the otherwise unqualified application of s 601AD(1). That fiction is to be applied when relevant in determining rights or liabilities defined by reference to past events, as explained by Gleeson CJ in Macquarie Bank Ltd v Fociri Pty Ltd (1992) 27 NSWLR 203 at 207-208. Those findings as to past events are to be made on the basis of material available at the time of the hearing in which the determination is to be made.*"

32. At the time of the hearing before the primary judge, the relevant rights of SAM and SAP to claim the balance of the purchase price were known. The majority, however, ignored the "statutory fiction" and instead found that SAM had not, during the period of its deregistration, "carried on particular activities which, in fact, it did not carry on, and could not possibly have carried on, in that period" (at **FC [75]** (**CAB [60]**), Yates J) and that s 601AH(5) "did not deem SAM to have carried on a business, scheme or undertaking with SAP for the relevant period when SAM was deregistered and the alleged chose in action was vested in ASIC, with SAM having no liquidator" (at **FC [152]** (**CAB [75]**), Beach J).

33. These conclusions were both incorrect.

34. By operation of s 601AH(5), the relevant cause of action was deemed to have remained an asset of, and for the use of, SAM during the period it was deregistered. Each of those conclusions elides consideration of the nature of the chose in action, and the undertaking which was being carried on at the time of the hearing.

35. Further, and as Markovic J correctly observed in her Honour's dissenting judgment, *"[t]he primary judge made the orders for reinstatement of SAM first. The effect of those orders was and is that SAM is taken to have continued in existence as if it had not been deregistered and, among other things, any property that vested in the Commonwealth or ASIC revests in SAM: see s 601AH(5) of the Corporations Act. His Honour then made the pooling order pursuant to s 579E(1) of the Corporations Act. Thus at the time the pooling order was made SAM was taken to have continued in existence and so to have continued in its joint business or undertaking with SAP of getting in and paying debts."*

10 36. For these reasons, it is respectfully submitted that the majority were incorrect in failing to find that s 601AH(5) of the *Corporations Act* operated to deem SAM to have carried on a business, scheme or undertaking with SAP during the period of its deregistration.

Part VII: The Appellants seek the orders in the Notice of Appeal.

Part VIII: The Appellants estimate that they will require about 1 hour of oral submissions in chief.

Dated: 3 November 2023

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M R PESMAN
Queens Square Chambers
(02) 9221 4752
mpesman@qsc.com.au

M L ROSE
Nine Wentworth
(02) 8815 9284
mrose@ninewentworth.com.au

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ANNEXURE TO THE APPELLANTS' SUBMISSIONS

Pursuant to Practice Direction No. 1 of 2019, the Appellants set out below a list of the statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
1.	*Corporations Act 2001* (Cth)	12 November 2021	Sections 477, 579E, 601AH