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' REPLY

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

Part II: Appellants' reply

1. In addition to addressing the three grounds of appeal, the First Respondent seeks to put in issue in this Court the existence and/or prospects of the chose in action relied on by the Appellants at first instance and in the Full Court. The Appellants had not previously understood there to be any such issue (not least because each of the judgments of the Full Court proceeded on the basis that the chose in action existed as either common ground or being unnecessary to determine (Yates J at **FC [76], CAB [60]**, Beach J at **FC [136], CAB [72]** and Markovic J at **FC [241], CAB [98]**).

2. Although the Court would not permit the issue to be ventilated now in the absence of a notice of contention or cross-appeal, it is still useful to address it because, with respect, it sheds light on the errors asserted in the reasons of the majority in relation to that claim.

3. Terms defined in these submissions have the same meaning given to them in the Appellants' submissions of 3 November 2023 (**AS**). Paragraphs in the First Respondent's submissions are referred to as **RS#**.

The chose in action (Ground 3)

4. The precise date on which the cause of action asserted by the Liquidator arose did not assume any particular significance in the litigation prior to Beach J's reliance on the fact that both SAP and SAM were in liquidation after 13 May 2016 (that is, a date between exchange and settlement of the contract of sale of the printing business – see AS12-14) to support his Honour's conclusions in relation to the possibility of a joint undertaking.

5. The First Respondent submits (at RS1) that "*it is not common ground, and it is contested, that the Appellants were deprived of part of the purchase price*" and, later in that same paragraph, that "*[t]here was no acceptance by the First Respondent (the appellants in the FC) that sale meant exchange. It was not common ground that the Appellants were deprivded [sic] of part of the purchase price.*" It is not entirely clear if what is in issue is whether there is a relevant chose in action at all (an assumption upon which the Full Court proceeded) or if what is in issue is the date of its accrual.

6. More importantly, the fact that the First Respondent does not agree that there is a good claim does not demonstrate the claim does not exist (and, as Yates J observed at **FC [88], CAB [63]**, by the time of the hearing in the Full Court, proceedings in relation to the claim had been commenced in the Supreme Court of New South Wales). In this connection, whether or not a chose in action (being in this case the right to bring a claim) will ultimately be successful is not to the point (and all choses of this nature can be described as "mere allegations" (RS1 and 3) though what work is being done by the adjective is not clear). Rather, and as set out at AS[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.

7. As set out at AS [12] – [13], 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 to recover those moneys. In this context, Beach J erred in concluding that SAP and SAM were both in liquidation at the time the chose in action arose.

8. Nothing said at RS3 and RS4 affects that conclusion. Those submissions appear to do no more than to seek to reagitate matters determined by the primary judge, and not disturbed by the Full Court. Further, the submissions at RS4 that the Appellants have not sought to assert a claim against the purchaser or the receiver adds nothing to the argument in circumstances where the claim is that described by Yates J at **FC [19] – [21], CAB [50] – [51]**, being a claim against MGS and the McMillans in respect of the Diverted Proceeds.

Section 579E(1)(b)(iv) and sections 477 and 493

9. Contrary to RS9:

   (a) there is no tension between ss 477(1)(a)(i) and 493 of the *Corporations Act* (nor was there any suggestion at AS13 that one provision "overrides" the other). The effect of each of those provisions is that a liquidator is permitted to continue to operate a company's business in the course of the liquidation if the liquidator forms the view that to do so is required "for the beneficial disposal or winding up of that business" (indeed, that phrase appears in both sections - and see *Crouch re Heritage Fine Wines P/L* [2007] 214 FLR 244; [2007] NSWSC 10555 at [22]-[25]); and

   (b) there is no suggestion that the primary judge did put those limitations "to one side".

10. More importantly, nothing in either section, in terms or otherwise, suggests that it is impermissible for a company in liquidation (or two companies in liquidation) to conduct a joint business with each other or another entity.

11. The submission at RS10 is question begging, in that it assumes the conclusion that the existing business of SAP and SAM did not extend to "getting in and paying debts" (Markovic J at **FC [248], CAB [100]**). This is addressed at AS19-20.

12. Contrary to RS11, s 493 has nothing to do with the existence or otherwise of the chose in action. That is because, although the First Respondent correctly observes that, absent a pooling order (or determination) being made, the assets of one insolvent company cannot be used to satisfy the debts (more correctly, claims) of

creditors of another insolvent company. The First Respondent then incorrectly conflates this uncontroversial concept with the fact that the chose in action was and is jointly held by both SAP and SAM.

13. To like effect, and as set out at AS14, the submissions at RS12 and RS13 appear to confuse the uncontroversial effect of s 493 with the ability of two insolvent companies to continue to carry on business jointly. Nor does anything in RS14 or RS15 detract from the proposition set out in AS26 (to which that paragraph purports to respond): the submissions at RS14 and RS15 restate the argument advanced by the First Respondent before the Full Court, which is addressed at AS25 – AS28.

The argument that, upon deregistration, SAM ceased to exist

14. The answer to RS16 – RS24 is found in the reasons of Markovic J at **FC [242], CAB [98]**. As her Honour, with respect correctly, observed, the business carried on jointly by SAP and SAM did not cease upon sale of the printing business, but rather, changed from one of active trade to one of recovery and payment of debts.

15. Further, and for the reasons set out at AS19 – AS27, Markovic J was in any event plainly correct in reaching the conclusion at **FC [242], CAB [98]**.

The effect of section 601AH(5)

16. This aspect of the First Respondent's submissions is premised on the First Respondent's apparent rejection of the finding of Markovic J that, at the time of SAM's deregistration, it had carried on a business jointly with SAP. For the reasons set out above, that premise cannot be established, and once that is accepted, the balance of the First Respondent's argument is difficult to maintain.

17. Although the events in RS27 may be accepted as having occurred, those events do not lead to the conclusion for which the First Respondent contends. In particular, and as set out at AS34, s 601AH(5) deemed the relevant cause of action to have remained an asset of, and for the use of, SAM during the period it was deregistered.

18. In this context, and for the same reasons that the Appellants submit at AS33 – AS36 that each of Yates and Beach JJ were in error in concluding that s 601AH(5) of the *Corporations Act* did not deem SAM to have carried on a business, scheme or undertaking with SAP for the relevant period when SAM was deregistered, so too are the First Respondent's submissions at RS25 – RS31 incorrect.

The effect of the Full Court's judgment

19. The First Respondent's submissions at RS32 – RS33 do not grapple with the legal effect of the conclusions reached by Yates and Beach JJ.

20. As set out at AS29, the reasons of Yates and Beach JJ are inconsistent with the clear terms of s 601AH(5) of the *Corporations Act*. Contrary to RS32, if those reasons were accepted, it follows 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 s 601AH(5) of the *Corporations Act* are ignored.

21. The conclusions reached by Yates and Beach JJ were not (*cf* RS32) fact specific, and the example (far removed from the facts of this case) advanced by the First Respondent does not assist it. As a preliminary matter, that example presumes deregistration where the relevant company is not in liquidation. That example also does not engage with the question of the applicability of the pooling provisions in connection with a business. Simply put: if one is to accept the reasons of Yates and Beach JJ, then it must follow that, outside a very narrow factual circumstance of joint ownership of property, not in contemplation otherwise in s 579E(1) of the *Corporations Act*, pooling is not available where one of the companies to be pooled has been reinstated, as any joint undertaking, business or scheme would, on the reasons of Yates and Beach JJ, have been severed.

The SAM liquidator was not party to the pooling order application

22. RS34 can be addressed briefly: no argument was addressed to the primary judge (or the Full Court) in relation to the "intendment" of the pooling regime (to the extent that can be identified) or any decision of the Liquidator, deliberate or otherwise, in relation to it. No standing or notice argument has previously been raised; it is too late to do so now.

Dated: 22 December 2023

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ANNEXURE TO THE APPELLANTS' REPLY

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, 493, 579E, 601AH