HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ

G & M ALDRIDGE PTY LTD APPELLANT

AND

JOHN MARTIN WALSH RESPONDENT
(as Liquidator of Thompson Land Limited
(Receiver and Manager Appointed) (In
Liquidation))

G & M Aldridge Pty Ltd v Walsh
[2001] HCA 27
24 May 2001
M104/2000

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation:

M L Sifris for the appellant (instructed by Rockman & Rockman)

I J Hardingham QC with A P Rodbard-Bean for the respondent (instructed by Abbott Stillman & Wilson)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ

ELECRAFT (AUST) PTY LTD — APPELLANT

AND

JOHN MARTIN WALSH
(as Liquidator of Thompson Land Limited
(Receiver and Manager Appointed) (In
Liquidation)) — RESPONDENT

Elecraft (Aust) Pty Ltd v Walsh
24 May 2001
M105/2000

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation:

M L Sifris for the appellant (instructed by Rockman & Rockman)

I J Hardingham QC with A P Rodbard-Bean for the respondent (instructed by Abbott Stillman & Wilson)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ

K & V PLUMBERS PTY LTD APPELLANT

AND

JOHN MARTIN WALSH RESPONDENT
(as Liquidator of Thompson Land Limited
(Receiver and Manager Appointed) (In
Liquidation))

K & V Plumbers Pty Ltd v Walsh
24 May 2001
M106/2000

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation:

M L Sifris for the appellant (instructed by Rockman & Rockman)

I J Hardingham QC with A P Rodbard-Bean for the respondent (instructed by Abbott Stillman & Wilson)

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HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ

BARDEN-STEELDECK INDUSTRIES PTY LTD — APPELLANT

AND

JOHN MARTIN WALSH (as Liquidator of Thompson Land Limited (Receiver and Manager Appointed) (In Liquidation)) — RESPONDENT

Barden-Steeldeck Industries Pty Ltd v Walsh
24 May 2001
M107/2000

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation:

M L Sifris for the appellant (instructed by Rockman & Rockman)

I J Hardingham QC with A P Rodbard-Bean for the respondent (instructed by Abbott Stillman & Wilson)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

G & M Aldridge Pty Ltd v Walsh
Elecraft (Aust) Pty Ltd v Walsh
K & V Plumbers Pty Ltd v Walsh
Barden-Steeldeck Industries Pty Ltd v Walsh

Companies – Winding up in insolvency – Preference – Payments made by project manager to unsecured creditors – Payments from property subject to fixed and floating charge – Payments made after crystallisation of floating charge – Chargee took no action in relation to payments – Whether payments had effect of giving creditors a preference, priority or advantage over general body of unsecured creditors.

Words and phrases – "preference, priority or advantage".

Bankruptcy Act 1966 (Cth), s 122(1), (2).
Companies Code (Vic), s 451.

1 GLEESON CJ, GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ. Four appeals were heard together. Each raises an identical issue, arising out of the same transaction, concerning the preference provisions of the *Companies Code* (Vic) ("the Code") and the *Bankruptcy Act* 1966 (Cth) ("the Act"). The respondent to each appeal, the liquidator of Thompson Land Limited (Receiver and Manager Appointed) (In Liquidation) ("TLL"), commenced actions in the County Court of Victoria against each appellant for the recovery of amounts said to represent payments or transfers of property which were void as against the respondent by virtue of s 451 of the Code. The actions were heard by Judge Ostrowski. They were successful. Appeals to the Court of Appeal of the Supreme Court of Victoria were dismissed[1].

2 The issues have narrowed as the litigation has proceeded. Some of the points argued before Judge Ostrowski were not pursued in the Court of Appeal; and the present appeal does not cover all of the issues decided by the Court of Appeal. The central point argued in this Court concerns the significance of a floating charge that had crystallised before the impugned transaction. In order to explain the argument it is necessary to outline the facts and make brief reference to some of the other issues that arose at earlier stages.

3 TLL was wound up by order of the Supreme Court of Victoria on 6 September 1990. The respondent was appointed liquidator. The application for winding up had been filed on 15 May 1990.

4 At all material times, Australia and New Zealand Banking Group Ltd ("the Bank") was a secured creditor of TLL, the security being a mortgage debenture which gave the Bank a fixed charge over certain assets and a floating charge over all other assets of TLL. The debenture provided for automatic crystallisation of the floating charge in certain circumstances which, it is agreed, arose on 9 March 1990. It also empowered the Bank to appoint a receiver and manager to take possession of the secured property. The Bank did not make such an appointment until 27 April 1990.

5 TLL was a public company. Its shares were listed on the Stock Exchange. In early 1990 it had recently completed the development of a new shopping centre at Dandenong known as the Capital Centre. The Centre was occupied, and its shops were operating. However, trade creditors of TLL, including the appellants, were having difficulty obtaining payment of debts owing to them.

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1 *G & M Aldridge Pty Ltd v Walsh* [1999] 3 VR 601.

6 The appellants were four members of a larger group of 12 contractors who had worked on the construction of the Centre and to whom final payments were owed by TLL. They were not the only unsecured creditors of TLL. But they made common cause, and, in early March 1990, consulted the same solicitor, Mr Rockman. He, in turn, dealt with TLL's solicitors.

7 A company named Construction Engineering Pty Ltd had been appointed by TLL as the project manager for the Centre. That company, as agent for TLL, had engaged the contractors who worked on the Centre, and had attended to their payment on behalf of TLL. It appeared that, at the time Mr Rockman was consulted, Construction Engineering Pty Ltd was holding in its bank account an amount of approximately $400,000 on behalf of TLL, which represented over-payments made by TLL as advances to pay contractors. On 15 March 1990, Mr Rockman's clients entered into an agreement with TLL to the following effect. The amount of $400,000 was to be divided between the 12 contractors in proportion to the debts owing to them. TLL directed Construction Engineering Pty Ltd immediately to make the appropriate payment to each of the 12 contractors as a first instalment, or "deposit", on account of the debt. The balance of the debt was to be paid on 20 April 1990 and, as security, each contractor was assigned certain units held by TLL in the M & T Property Fund. The part payments were made by Construction Engineering Pty Ltd at the direction of TLL. The balance was never paid, and each creditor, on 20 April 1990, sold the units it was given as security for a small amount. The proceeds of sale left substantial amounts owing to each creditor. The respondent's action was to recover the part payments and the proceeds of sale of the units.

8 The Bank's charge had crystallised before the making of the part payments and the giving of the security over the units. There has been no suggestion that the assets of TLL were sufficient to pay out the Bank or that there was any surplus for unsecured creditors. At the time of the crystallisation of the charge, the assets of TLL included the sum of $400,000 held on its behalf by Construction Engineering Pty Ltd and the units in the M & T Property Fund. However, the Bank did not take, and never has taken, any steps to enforce whatever rights it had, or may later have had, in respect of those assets. Judge Ostrowski, after referring to the fact that the event which caused the charge to crystallise was a notice to pay delivered to TLL by the Bank on 9 March 1990, and that the Bank did nothing to follow up the notice until it appointed a receiver and manager on 27 April 1990, said:

> "[The Bank] permitted the bank account of TLL to be operated both up and down for quite some time [after 9 March]. It negotiated with TLL concerning a refinancing of its borrowings. Indeed, it offered a $5m

refinancing which could not come to fruition because TLL could not [fulfil] the conditions attached to it. It released the units in the M & T Property Fund to serve as security for the balance payable to [the appellants] on 20 April 1990."

9 Those findings were made in response to an argument that there had been waiver, estoppel, or acquiescence which defeated any rights that the Bank might otherwise have had. The learned judge found it unnecessary to decide those questions, or to make any further findings about the action or inaction of the Bank. When regard is had to the passage just quoted, it may not be difficult to understand why the Bank has never subsequently taken any action in relation to the $400,000 or the proceeds of sale of the units. However that may be, there are no findings concerning the conduct of the Bank additional to those set out above.

10 The financial position of TLL during March, and the early part of April 1990, was the subject of considerable uncertainty at the time. That uncertainty was reflected in the issues litigated before Judge Ostrowski. On 1 March 1990, the Supreme Court of Victoria granted an injunction restraining a creditor, Landkon Pty Ltd, from filing an application for an order to wind up TLL. On 19 February 1990, the directors of TLL had signed a formal declaration of solvency, which was treated as evidence of solvency in the injunction proceedings. There was no evidence, and Judge Ostrowski made no findings, as to the reasons for the delay between the crystallisation of the Bank's charge and the appointment of a receiver and manager, or as to the extent of the Bank's knowledge of the agreement between TLL and Mr Rockman's clients, including the appellants.

11 Section 122 of the Act provided, so far as presently relevant:

"122(1) A conveyance or transfer of property, a charge on property, or a payment made, or an obligation incurred, by a person who is unable to pay his debts as they become due from his own money (in this section referred to as 'the debtor'), in favour of a creditor, having the effect of giving that creditor a preference, priority or advantage over other creditors, being a conveyance, transfer, charge, payment or obligation executed, made or incurred:

(a) within 6 months before the presentation of a petition on which, or by virtue of the presentation of which, the debtor becomes a bankrupt …

…

is void as against the trustee in the bankruptcy.

…

(2) Nothing in this section affects:

(a) the rights of a purchaser, payee or encumbrancer in good faith and for valuable consideration and in the ordinary course of business."

12 Section 451 of the Code provided, so far as relevant, that a transfer of property, a charge on property, or a payment made, by a company that, if it had been a natural person, would, in the event of his becoming a bankrupt, be void as against the trustee in bankruptcy, is, in the event of the company being wound up, void as against the liquidator. The payments made to the appellants by Construction Engineering Pty Ltd at the direction of TLL, and the transfers of the units by way of security were, it is agreed, made within the period which, by virtue of s 451 of the Code, corresponds to the period referred to in s 122(1)(a) of the Act.

13 The issues argued in the County Court were whether TLL was, on 15 March 1990, unable to pay its debts as they became due from its own money; whether the payments made by Construction Engineering Pty Ltd to the appellants and the other clients of Mr Rockman were, for the purposes of ss 122 and 451, made by TLL; whether those payments and the transfers of the units had the effect of giving the appellants a preference, priority or advantage over other creditors; and whether the appellants could claim the benefit of s 122(2)(a).

14 Judge Ostrowski resolved the first, second, and third issues in favour of the respondent. As to the fourth issue, he found that the appellants acted in good faith, but that the payments and transfers of property were not in the ordinary course of business.

15 Only the second and third issues were argued in the Court of Appeal. The argument on the second issue turned upon the capacity in which Construction Engineering Pty Ltd held the sum of approximately $400,000. The Court of Appeal decided that, in the circumstances, the payments made by Construction Engineering Pty Ltd, as agent for and at the direction of TLL, of moneys it was holding on behalf of TLL, amounted to payments by TLL. Since that matter has not been pursued in this Court, it is unnecessary to go into the reasoning of the Court of Appeal on the question.

16 It is the third issue that was pursued in this Court. The appellants argued that they received no preference, priority or advantage over other creditors of TLL. The reason for that was said to lie in the existence, as at 15 March 1990, of the charge to the Bank, the prior crystallisation of the charge, so that it had become a fixed charge over the amount of approximately $400,000 and the units in the M & T Property Fund, and the agreed fact that the assets the subject of the charge were insufficient to pay TLL's debt to the Bank. It follows, according to the argument, that if TLL had been put into liquidation immediately before the transaction of 15 March 1990, there would have been no surplus available for unsecured creditors, and, in particular, the moneys held by Construction Engineering Pty Ltd on behalf of TLL, and the units, would all have gone to the Bank. In those circumstances, it was contended, the inaction of the Bank was irrelevant. The charge having crystallised, the moneys held by Construction Engineering Pty Ltd on behalf of TLL, and the units, were not assets available to the unsecured creditors in a winding up of TLL, and the appellants therefore received no preference, priority or advantage over other creditors.

17 To characterise the conduct of the Bank as mere inaction may involve over-simplification. As was noted earlier, the respondent argued in the County Court that the Bank, by its conduct, waived its rights, or, by reason of estoppel or acquiescence, would have been precluded from enforcing them; and the Bank has never attempted to enforce a claim either against the appellants or the respondent in relation to the subject matter of the present proceedings. Neither Judge Ostrowski nor the Court of Appeal found it necessary to deal with the respondent's arguments, with the result that there are no findings of fact sufficient to enable us to deal with the question, which has not been pursued in this Court. And there is no occasion to decide whether, consistently with the reasoning in *N A Kratzmann Pty Ltd (In Liq) v Tucker [No 2]*[2], the effect of the orders made in favour of the respondent, if upheld, would defeat any claim which the Bank might now make. The Bank is not a party to this litigation.

18 The appellants rely upon the following passage in the judgment of Brennan CJ in *Sheahan v Carrier Air Conditioning Pty Ltd*[3]:

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2 (1968) 123 CLR 295 at 301-302.

3 (1997) 189 CLR 407 at 424-425.

> "If a fund in the hands of a debtor or a debtor's agent is charged with the payment of a secured debt that would exhaust the fund, so that no part of the fund is available for distribution among the general creditors, and a payment to a general creditor is made out of the fund with the consent of the chargee, that creditor gains no preference at the expense of other general creditors. The effect of such a payment is not to prefer the payee among the general creditors but to prefer the payee to the secured creditor who would otherwise have been entitled to the money paid. And, as the secured creditor has consented to the payment, no recoupment of the money paid is possible."

19 To like effect is a passage in the judgment of Finkelstein J in *Wily v St George Partnership Banking Ltd*[4].

20 The facts in *Wily* differed from those here. The payments held not to be preferential were made not to unsecured creditors but to the bank which held a floating charge but was not fully secured. Two payments were made in realisation of that security, to which the claims of the unsecured creditors were subject. But the third payment was made at an earlier stage to reduce existing indebtedness. At the time of this third and critical payment, the charge had not fixed upon the property applied in making the payment. In the Court of Appeal in the present case, Phillips JA expressed reservations concerning the conclusion that the property applied in the third payment was not "available" for the unsecured creditors. It is unnecessary for us to decide whether we agree with those reservations respecting the third payment. This is because, in any event, we would not accept *Wily* as authority for a general proposition that payments out of assets not "available" to unsecured creditors can never be preferential.

21 The case of *Sheahan* concerned a secured creditor which appointed a receiver and manager to an insolvent company attempting to trade out of its difficulties. The receiver opened an account pursuant to s 421(1) of the Corporations Law, into which he paid the proceeds of realised assets which were subject to the security. From that account he made payments to creditors in order to encourage them to continue to supply goods and services. Three members of the Court held that the payments were not relevantly made by the company. Brennan CJ held that they were made by the company, but were not preferences. It was in the course of giving his reasons for that conclusion that he made the observation quoted above. And it was in that context that Brennan CJ referred to

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4 (1999) 84 FCR 423 at 435.

the payment being made with the consent of the secured creditor who would otherwise have been entitled to receive the proceeds of the realisation of assets the subject of the security.

22 The premise for the conclusion reached by Brennan CJ in *Sheahan*, that the payment in issue was made by the company, should not be accepted. Further, even if, as is the case in the present matters, a payment is made by the company, the question is not whether the payment was "at the expense of other general creditors"[5]. The question is whether the payment gave the recipient a preference, priority or advantage.

23 It is not the case that the existence of an equitable interest in a third party, whether by way of ownership or security, in property which is transferred, or money which is paid, to an unsecured creditor necessarily denies the possibility the unsecured creditor is thereby preferred as against other unsecured creditors. That is demonstrated by so much of the decision in *Richardson v The Commercial Banking Co of Sydney Ltd*[6], as concerned a cheque for £390 which a client, Mrs Turner, handed to her insolvent solicitor, Price. The cheque represented the balance of purchase money for a property bought by Mrs Turner. Price banked it to the credit of an account which was overdrawn and in excess of security held by the bank. It was held that the bank obtained a preference.

24 Dixon, Williams and Fullagar JJ pointed out that if, in an identifiable form, the money representing the cheque had come into the hands of the official receiver, Mrs Turner would have had a tracing remedy and the money would never have been available to Price's creditors. Their Honours added that Price could be taken to have converted the cheque so that, had Mrs Turner wished, she was entitled to prove in the bankruptcy with the general creditors.

25 Dixon, Williams and Fullagar JJ, referring to s 95 of the *Bankruptcy Act* 1924 (Cth), which, so far as is relevant, corresponds to s 122 of the Act, then said[7]:

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5 (1997) 189 CLR 407 at 424.

6 (1952) 85 CLR 110.

7 (1952) 85 CLR 110 at 136-137.

> "On the whole it appears to us that the payment of a cheque representing trust funds into the office account, were it otherwise to operate to give a preference to the bank, would be within s 95. It is within s 95 because, although the same moneys could never but for the misappropriation have been available to the bankrupt's creditors, there would be a preference, priority or advantage effected in favour of the bank as a creditor, in making a payment to it, when other creditors must prove and other creditors suffer the disadvantage of being exposed to the competition upon the assets of the proof of the defrauded owner of the funds. If the payment to the bank is undone at the suit of that owner, that would be another matter. If it is undone at the suit of the Official Receiver, then the owner may or may not be able to follow the moneys into his hands. That is a question involving matters of law and of fact and we are not now called upon to decide it in either branch."

26 The juridical nature of a floating charge has been examined in numerous cases and by commentators. It was referred to by Brennan CJ in *Sheahan*[8], and was discussed by Gleeson CJ in *Fire Nymph v The Heating Centre (in liq)*[9]. A provision for automatic crystallisation of a floating charge, which, as in the present case, may occur some time before the secured creditor intervenes in the debtor's affairs by appointing a receiver and manager, may give rise to competing equities. It may be one thing to say, where a charge has become fixed and the subject assets have been realised, that the proceeds of realisation are, in the circumstances, unavailable to the general body of creditors in a bankruptcy or winding up. It is another thing to say that the crystallisation of a floating charge, regardless of what the chargee does or fails to do thereafter, necessarily means that assets the subject of the charge may never be dealt with in such a manner that may benefit some or all of the unsecured creditors, or that may give some of them a preference, priority or advantage over others.

27 As in the present case, a floating charge is commonly given over the whole of the undertaking and assets of a company. One of the primary objectives of a floating charge is to enable a debtor company to carry on its business as a going concern and dispose of its assets in the ordinary course of business notwithstanding the existence of the charge. In the situation of uncertainty that existed in relation to TLL between 9 March and 27 April 1990, when the

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8 (1997) 189 CLR 407 at 422-423.

9 (1992) 7 ACSR 365 at 371-373.

company continued to trade, and was negotiating with the Bank as to future arrangements, an assertion that none of its assets were "available" to unsecured creditors begs the question. There was at least a possibility that some or all of those assets might find their way to some or all of those creditors; as in fact occurred. There was also a possibility that this might happen, with or without the knowledge of the Bank, in circumstances where the Bank either could do nothing, or might choose to do nothing, to undo that result.

28 If the assets which had been disbursed to some of the unsecured creditors were promptly recovered by the Bank, those unsecured creditors would have no preference, priority or advantage over others. If, as here, the unsecured creditors retain the payments, they are preferred to others. It is no answer to the conclusion that there is a preference in such a case to say that the Bank might have acted differently. Nor is it an answer to say that there might be, or even will be, no assets that will be available for distribution between remaining unsecured creditors. It is no answer because, first, they are preferred in the obvious sense that their debts are wholly or partly met by the debtor[10]. Secondly, they are preferred over other unsecured creditors who "suffer the disadvantage of being exposed to the competition upon the assets of the proof"[11] of the Bank in an amount greater than would be the case had the assets been applied to the Bank's debt rather than being depleted by the payment to the preferred unsecured creditors. Unlike the circumstances considered in *Sheahan* it cannot be said that the payments were made by the secured creditor rather than the company.

29 In *Ferrier and Knight v Civil Aviation Authority*[12], a Full Court of the Federal Court of Australia[13] examined the policy considerations underlying the preference provisions of bankruptcy laws in a number of common law jurisdictions. The case concerned complexities of running accounts that are not presently relevant. The Full Court, observing that, as in the United States, and unlike the position in England, Australian preference provisions operate objectively, rather than by reference to the subjective purpose of the debtor,

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10 *Richardson v The Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110 at 136.

11 (1952) 85 CLR 110 at 137.

12 (1994) 55 FCR 28.

13 Beaumont, Gummow and Lindgren JJ.

quoted a passage from a 1977 House Committee Report[14] which had, in turn, been cited by the Supreme Court of the United States in *Union Bank v Wolas* in 1991[15]:

> "The purpose of the preference section [of *The Bankruptcy Reform Act of 1978*] is two-fold. First, by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with all of his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally. The operation of the preference section to deter 'the race of diligence' of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section – that of equality of distribution."

30 The same policy is at work in the Australian legislation. A primary objective is that of securing equality of distribution amongst creditors of the same class. The pursuit of that objective has the consequential effect of deterring the "race to the courthouse" and that, in turn, enhances the prospect of enabling debtors to trade out of their difficulties without undue and discriminatory risk to creditors.

31 In the present case, the appellants were members of a larger class of unsecured creditors. That class also included, but was not limited to, the other contractors who consulted Mr Rockman. As between the 12 contractors (including the appellants) and the other unsecured creditors, the 12 contractors obtained a preference, priority or advantage in that the amount of approximately $400,000, and the units in the M & T Property Fund, became available to them and not to unsecured creditors generally. And, as in *Richardson*, to the extent to which there was a shortfall to the Bank, the other creditors had to suffer the competition of the Bank in a distribution of any other assets. The fact that there may not have been any other assets does not alter the principle.

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14 House Committee Report No 95-595 (1977) at 177-178.

15 502 US 151 at 161 (1991).

32 We are not concerned with what the position would have been if the assets presently in dispute had been seized by the Bank or a receiver had been appointed. As between the members of the class consisting of the unsecured creditors of TLL, in the events that happened, because of the decision of the Bank (perhaps for good commercial purposes) not to enforce its charge for a time, even though it had crystallised, assets were paid or transferred by TLL to some but not to others. To say that, if the Bank had acted differently, those assets would have been applied solely for the benefit of the Bank, is not to deny that some members of the class of unsecured creditors obtained a preference, priority or advantage over others.

33 The appeals should be dismissed with costs.