

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN AND STEWARD JJ

METAL MANUFACTURES PTY LIMITED

APPELLANT

AND

GAVIN MORTON AS LIQUIDATOR OF
MJ WOODMAN ELECTRICAL CONTRACTORS
PTY LTD (IN LIQUIDATION) & ANOR

RESPONDENTS

Metal Manufactures Pty Limited v Morton
[2023] HCA 1
Date of Hearing: 12 October 2022
Date of Judgment: 8 February 2023
B19/2022

ORDER

1. *Appeal dismissed.*
2. *The costs of this appeal be costs in the cause.*

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC with G P McNally SC and J W Pokoney for the appellant
(instructed by Breene & Breene Solicitors)

J D McKenna KC with P E O'Brien for the respondents (instructed by Taylor
David Lawyers)

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formal revision prior to publication in the Commonwealth Law
Reports.

CATCHWORDS

Metal Manufactures Pty Limited v Morton

Corporations – Winding up – Insolvency – Set-off – Unfair preferences – Where appellant received payments from company within six-month period prior to winding up – Where liquidator of company sought to recover payments from appellant under s 588FF(1)(a) of *Corporations Act 2001* (Cth) ("Act") as unfair preferences under s 588FA of Act – Where appellant owed separate and distinct debt by company – Whether set-off under s 553C(1) of Act available to appellant against liquidator's claim for recovery of unfair preferences.

Words and phrases – "commencement of the winding up", "contingent right", "insolvency", "insolvent transaction", "liquidation", "liquidator's duties and powers", "mutual dealing", "mutuality", "pari passu principle", "set-off", "statutory scheme of liquidation", "unfair preference", "voidable transaction", "winding up".

Corporations Act 2001 (Cth), ss 474, 477, 478, 553, 553C, 555, 556, 588FA, 588FC, 588FE, 588FF, 588FI.

1 KIEFEL CJ, GORDON, EDELMAN AND STEWARD JJ. Metal Manufactures Pty Limited ("the appellant") was paid \$50,000 and \$140,000 by MJ Woodman Electrical Contractors Pty Ltd, a company now in liquidation ("MJ Woodman"). Both payments were made within the six-month period prior to the winding up of MJ Woodman ("the relation-back period"). The liquidator of MJ Woodman ("the first respondent") sought to recover both payments from the appellant under s 588FF(1)(a) of the *Corporations Act 2001* (Cth) ("the Act") on the basis that each was an unfair preference under s 588FA of the Act. The appellant alleges, and the respondents concede, that MJ Woodman owes the appellant \$194,727.23. This is a separate and distinct debt from the liability which is said to arise under s 588FF(1)(a). The appellant contends that it has, pursuant to s 553C of the Act, a right to set off its potential liability to repay the alleged unfair preferences against the separate debt owed to it.

2 Given that the separate debt exceeds the amount of the alleged unfair preferences, if the appellant could set off that debt under s 553C(1), the first respondent would not obtain an order for payment under s 588FF(1)(a). Accordingly, by an Amended Special Case, Derrington J reserved for consideration by the Full Court of the Federal Court the following question:

"Is statutory set-off, under s 553C(1) of the *Corporations Act 2001* (Cth) ("Act"), available to the [appellant] in this proceeding against the [first respondent's] claim as liquidator for the recovery of an unfair preference under s 588FA of the Act?"

3 In a comprehensive set of reasons, the Full Court said that the question posed should be answered "No"¹. In separate reasons, the Full Court also ordered that the issue of costs in the special case be remitted for determination by the docket judge². For the reasons which follow, the answer given by the Full Court was correct, the costs order should not be disturbed, and the costs of this appeal should be costs in the cause.

1 *Morton v Metal Manufactures Pty Ltd* (2021) 289 FCR 556 at 560 [5] per Allsop CJ (Middleton and Derrington JJ agreeing).

2 *Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd v Metal Manufactures Pty Ltd* [No 2] [2022] FCAFC 1.

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The statutory scheme

4 Whether a right of set-off is available requires consideration of the applicable statutory scheme.

Liquidator's duties and powers

5 The survey commences with Div 2 of Pt 5.4B of Ch 5 of the Act³. Chapter 5 addresses the various forms of external administration of a company, and Div 2 of Pt 5.4B deals with an instance of such administration, namely the appointment of a liquidator by a Court following the making of an order for the winding up of a company⁴. Pursuant to s 474 of the Act, relevantly the liquidator must take into his or her custody, or under his or her control, all of the property which is, or appears to be, the property of the company being wound up. Unlike the case of a person who becomes a bankrupt, where the property of the bankrupt vests in the Official Trustee⁵, the property of the company does not vest in the liquidator⁶. Thereafter, pursuant to s 477 of the Act, the liquidator is empowered, amongst other things: to carry on the business of the company⁷; to pay any class of creditors subject to s 556 of the Act (as to which see below)⁸; to make any compromise or arrangement with the creditors of the company⁹; to compromise any calls, liabilities and debts subsisting between the company and a contributory or other debtor¹⁰; to bring or defend proceedings in the name and on behalf of the company¹¹; to sell all or any

3 Whilst not part of the Amended Special Case, this Court has assumed that MJ Woodman was placed into liquidation by Court order pursuant to s 472 of the Act. That assumption does not affect the outcome of this appeal.

4 See s 472 of the Act.

5 See s 58 of the *Bankruptcy Act 1966* (Cth).

6 Pursuant to s 474(2) of the Act, a Court may order, on the application of a liquidator, the vesting of all or part of the property of the company in that liquidator.

7 Sub-section (1)(a).

8 Sub-section (1)(b).

9 Sub-section (1)(c).

10 Sub-section (1)(d).

11 Sub-section (2)(a).

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part of the property of the company¹²; to do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents¹³; and otherwise to do all things as are necessary for winding up the affairs of the company and distributing its property¹⁴. Generally, in exercising these powers, the liquidator must use his or her own discretion in the management of the affairs and property of the company and the distribution of its property¹⁵.

- 6 As soon as practicable after the company is ordered to be wound up, a liquidator must cause the property of the company to be collected and applied in discharging the company's liabilities¹⁶. The company, whilst being wound up, does not hold its property on trust for creditors and members. The statutory regime for the administration of a company in liquidation is both an exhaustive and sufficient measure for the distribution of the company's property which does not necessitate or justify the intervention of equity. As Menzies J observed in *Franklin's Selfserve Pty Ltd v Federal Commissioner of Taxation*¹⁷:

"It seems to me, however, that once a company is in liquidation the statutory provisions apply whether it be solvent or insolvent and it is not an easy distinction to say that if a company is insolvent it has ceased to have a beneficial interest in its assets, but, if it is not, it continues to do so. In each case it is for the liquidator to carry out the *statutory scheme of liquidation*, to pay creditors and to divide any surplus that there may be among contributories. Whether or not there may be a surplus hardly seems to me to bear upon the relationship between the company in liquidation and its assets." (emphasis added)

- 7 A plurality of this Court referred to the foregoing passage in *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)*¹⁸. Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ said that although the appointment of

12 Sub-section (2)(c).

13 Sub-section (2)(d).

14 Sub-section (2)(m).

15 Sub-section (6).

16 Section 478(1)(a) of the Act.

17 (1970) 125 CLR 52 at 70.

18 (2005) 220 CLR 592 at 608 [38].

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the liquidator circumscribed or suspended the exercise of the incidents of ownership of assets by the usual organs of the company, that did not mean that the company held its assets on trust¹⁹.

8 Nor does the liquidator hold any of the property that he or she gathers in and controls on trust for the creditors and members of the company²⁰.

9 It follows from acceptance of the proposition that the company remains the beneficial owner of all the property gathered in and controlled by the liquidator that it also is the beneficial owner of all payments received by it during the course of the winding up. This includes payments made to the company by order of a court pursuant to s 588FF(1) of the Act. That is not to deny, however, that the property of the company and any payments or transfers of property made to the company during the process of winding up are subject to the "statutory scheme of liquidation".

10 In that respect, it has been recognised that creditors of a company in liquidation enjoy a "special interest" – namely to have the assets of the company gathered together and then distributed²¹.

Proof and ranking of claims

11 Division 6 of Pt 5.6 of Ch 5 of the Act deals with the proof and ranking of claims against the company. Section 553(1) is a key provision and is as follows:

"Subject to this Division and Division 8, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company."

19 (2005) 220 CLR 592 at 613 [55].

20 *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 608 [35] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

21 *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 612 [54] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, citing *Ford and Austin's Principles of Corporations Law*, 7th ed (1995) at 1013.

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12 Section 553 creates an important cut-off date to determine what debts and claims are provable in the winding up. As Allsop CJ observed below, a critical feature of this provision is that it addresses only debts and claims against the company arising from "circumstances" which had occurred "before the relevant date"²². Here, the "relevant date" is the date when the winding up of a company is taken because of Div 1A of Pt 5.6 of the Act to have begun²³. The breadth of the language of s 553 is noteworthy²⁴. It extends to all debts payable by and all claims against the company, whether "present or future, certain or contingent, ascertained or sounding only in damages", which arise from "circumstances" before the commencement of the winding up. In contrast, s 82 of the *Bankruptcy Act 1966* (Cth), which addresses debts provable in bankruptcy, is limited to debts to which the bankrupt was subject as at the date of bankruptcy, or to which he or she may become subject "by reason of an obligation incurred before the date of the bankruptcy".

13 The purpose of s 553 is important. As Campbell JA observed in *BE Aust WD Pty Ltd v Sutton*²⁵, s 553 ensures that all legal obligations to which a company is subject are ascertained and then valued "at a common date", so that they can be taken into account in the winding up. Critically, and subject to one possible exception²⁶, no debt or claim arising from circumstances arising *after* the commencement of the winding up of the company is admissible to proof against the company in the liquidation.

14 Section 555 of the Act provides for the distribution of the assets of the company in accordance with the *pari passu* principle. It provides that, except as otherwise provided, all debts and claims proved in a winding up rank equally, and that if the property of the company is insufficient to meet such debts and claims, they must be paid proportionately. Many of the exceptions to this principle are set out in s 556 of the Act, which lists a series of payments to be made in priority to all unsecured debts and claims. These include: certain of the liquidator's

22 *Morton v Metal Manufactures Pty Ltd* (2021) 289 FCR 556 at 574 [60]. See also *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 at 223 [168] per Hayne J.

23 See definition of "relevant date" in s 9 of the Act.

24 See, eg, *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 at 224 [172] per Hayne J.

25 (2011) 82 NSWLR 336 at 363 [105].

26 See s 588FI of the Act, discussed at [29].

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expenses²⁷; the costs of the application for the winding up order²⁸; certain amounts owing to employees of the company before the date of winding up²⁹; and certain retrenchment payments payable to employees of the company³⁰.

Set-off

15 Section 553C of the Act confers the right of set-off relied upon by the appellant. It should be set out in full:

"Insolvent companies – mutual credit and set-off

- (1) Subject to subsection (2), where there have been mutual credits, 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:
 - (a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and
 - (b) the sum due from the one party is to be set off against any sum due from the other party; and
 - (c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.
- (2) A person is not entitled under this section to claim the benefit of a 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."

16 It might be thought that s 553C offends the *pari passu* principle because it gives the creditor a complete discharge of what it is owed, dollar for dollar. Such an observation is mistaken. The purpose of s 553C is to ascertain what is available for distribution on a *pari passu* basis. It is only the balance of any set-off (when it

27 Sub-sections (1)(a) and (dd).

28 Sub-section (1)(b).

29 Sub-sections (1)(g) and (1B); see also s 558 of the Act.

30 Sub-sections (1)(h) and (1C).

favours the creditor) which is then admissible to proof against the company for the purposes of s 553. Before then, the law permits a set-off of mutually incurred credits, debts or dealings because that is a just outcome chosen by Parliament. As this Court observed in *Gye v McIntyre*³¹, when considering the equivalent right of set-off conferred by s 86 of the *Bankruptcy Act*³²:

"It has often been pointed out that the object of set-off in bankruptcy is, in the words of Parke B in *Forster v Wilson*, 'to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate'. Where there are genuine mutual debts, credits or other dealings, it would be unjust if the trustee in bankruptcy could insist upon having 100 cents in the dollar upon the whole of the debt owed to the bankrupt but at the same time insist that the bankrupt's debtor must be satisfied with a dividend of some few cents in the dollar on the whole of the debt owed by the bankrupt to him. It was to prevent such injustice that the 'mutual credits' and 'mutual debts', and later 'mutual dealings', provisions were introduced into bankruptcy legislation". (footnote omitted)

17 Two key features of the set-off provision should be noted at this point.

18 First, s 553C has a temporal element. As has been explained, s 553 circumscribes the pool of claims which are provable in a winding up to those debts payable by and claims against the company "the circumstances giving rise to which occurred *before the [winding up]*" (emphasis added). The operation of s 553 informs the availability of set-off because after set-off under s 553C(1)(c) the balance of an account is admissible to proof – being proof admissible against the company under s 553. Accordingly, for the purposes of assessing whether there is mutuality, the rights of the parties are to be taken and ascertained as at the time of winding up³³; the important factor is whether there is an obligation or liability *prior to liquidation* which might mature into a debt owing³⁴. Thus, any acquisition by a

31 (1991) 171 CLR 609.

32 (1991) 171 CLR 609 at 618-619 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. See also *Morton v Metal Manufactures Pty Ltd* (2021) 289 FCR 556 at 588-589 [109] per Allsop CJ.

33 *Hiley v Peoples Prudential Assurance Co Ltd* (1938) 60 CLR 468 at 480 per Latham CJ, 495-496, 499 per Dixon J.

34 *Day & Dent Constructions Pty Ltd v North Australian Properties Pty Ltd* (1982) 150 CLR 85 at 91 per Gibbs CJ, 109 per Mason J.

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liquidator of new claims on behalf of a company cannot vary the parties' antecedent rights such as to be available for set-off³⁵.

19 And, secondly, as this Court explained in *Gye*, there are three aspects to a "mutual dealing"³⁶:

"The first is that the credits, the debts, or the claims arising from other dealings be between the same persons. The second is that the benefit or burden of them lie in the same interests. In determining whether credits, debts or claims arising from other dealings are between the same persons and in the same interests, it is the equitable or beneficial interests of the parties which must be considered: see, eg, *Hiley*. The third requirement of mutuality is that the credits, debts, or claims arising from other dealings must be commensurable for the purposes of set-off under the section. That means that they must ultimately sound in money."

20 It will be necessary to return to these features below.

Voidable transactions

21 Division 2 of Pt 5.7B of Ch 5 of the Act deals with voidable transactions. The relevant operative provision is s 588FF when read with a series of definitional provisions. It relevantly provides as follows:

"Courts may make orders about voidable transactions"

(1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:

(a) an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction;

...

35 *Hiley v Peoples Prudential Assurance Co Ltd* (1938) 60 CLR 468 at 487 per Rich J; see also at 491 per Starke J.

36 (1991) 171 CLR 609 at 623 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

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- (3) An application under subsection (1) may only be made:
- (a) during the period beginning on the relation-back day and ending:
 - (i) 3 years after the relation-back day; or
 - (ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;
 whichever is the later; or
 - (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.

..."

22 The liquidator's right to seek recovery pursuant to s 588FF of an unfair preference is part of the statutory scheme of liquidation concerned with maximising the distributable pool of assets. It is thus "in the nature of a corollary" to that scheme, including the provisions which prescribe the order of priorities to be observed by the liquidator in the application of the company's property³⁷. It is directed at ensuring that the administration of the company is not distorted by putting a debt "ahead of the place appropriate to it in the prescribed order"³⁸. In this way, the provision achieves its primary objective of "securing equality of distribution amongst creditors of the same class"³⁹.

23 The nature of the liability created by an order for the payment of money under s 588FF(1)(a) of the Act was disputed in this appeal. The appellant emphasised that the liability was one owed to the company, and that when discharged, the payment was received beneficially by the company in accordance with the principle established by *Linter Textiles*. As such, it was available to be

37 *Federal Commissioner of Taxation v Jaques* (1956) 95 CLR 223 at 229 per Dixon CJ, Fullagar, Kitto and Taylor JJ.

38 *Federal Commissioner of Taxation v Jaques* (1956) 95 CLR 223 at 229-230 per Dixon CJ, Fullagar, Kitto and Taylor JJ.

39 *G & M Aldridge Pty Ltd v Walsh* (2001) 203 CLR 662 at [30] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ; *Union Bank v Wolas* (1991) 502 US 151 at 161.

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applied in making priority payments and in making payments to creditors and contributories. It was not destined, as a legal necessity, to be distributed to creditors. Reference was made to s 482 of the Act⁴⁰, which, it was said, indicates that in the event of the termination of a liquidation under that section, a payment made pursuant to an order under s 588FF(1)(a) could conceivably be available to be deployed for the purposes of the company's ongoing business.

24 In contrast, the respondents emphasised that the cause of action created by s 588FF was one conferred upon the liquidator and not the company. Contrary to the contention of the appellant, they submitted that the cause of action conferred by s 588FF was not one exercisable by the liquidator as agent of the company⁴¹, but rather as an officer of the court. That submission should be accepted. When deciding to institute proceedings pursuant to s 588FF, the liquidator acts as an officer of the court charged with the duties and responsibilities created by the statutory scheme of liquidation. It follows that whilst the liquidator might in other situations be characterised as an agent of the company, for the purposes of s 588FF no reason exists to characterise the liquidator as acting in such a capacity. But amounts recovered by action under s 588FF are then to be dealt with according to the statutory scheme of liquidation.

25 The foregoing is consistent with history. Originally preferences were "void as against the assignee or trustee of the insolvent"⁴², rather than the company. But

40 Section 482(1) of the Act relevantly empowers the Court to stay a winding up indefinitely or for a limited time, or to terminate a winding up. Pursuant to s 482(3), where the Court has made an order terminating the winding up, the Court may give directions for the resumption of the management and control of the company by its officers. An order made pursuant to s 482 will have the effect of liberating whatever remains of the property of the company from the "statutory scheme of liquidation": see *Krextile Holdings Pty Ltd v Widdows; Re Brush Fabrics Pty Ltd* [1974] VR 689 at 695 per Gillard J. See also *Hughes, in the matter of Substar Holdings Pty Ltd (In liq)* [No 2] [2021] FCA 658 at [18]-[20] per McKerracher J and the authorities cited therein.

41 cf *Thomas Franklin & Sons Ltd v Cameron* (1935) 36 SR (NSW) 286 at 296 per Davidson J (Street and Maxwell JJ agreeing).

42 See, eg, s 73 of the *Insolvency Act 1890* (Vic).

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"void" in this sense meant only that preferences were voidable at the instance or election of the trustee or the liquidator⁴³.

26 Section 588FE defines what is a "voidable transaction". It only applies where a company "is being wound up". Relevantly here, s 588FE(2) provides that a transaction is voidable if it is an "insolvent transaction" of the company and it was entered into during the six months ending on the "relation-back day", which here was the day the winding up of MJ Woodman commenced⁴⁴. It was an agreed fact in the Amended Special Case that the relation-back period for the purposes of s 588FE(2) ran from 13 August 2018 to 12 February 2019.

27 Section 588FC defines what is an "insolvent transaction". Relevantly, a transaction is an "insolvent transaction" if it is an "unfair preference" given by the company and, at a time when the transaction was entered into, or when an act was done, or omission was made, for the purpose of giving effect to the transaction, the company was insolvent. The Amended Special Case does not state when MJ Woodman became insolvent. However, for the purposes of assessing whether set-off is available, this Court was asked to assume that this provision was satisfied in relation to each of the two payments in the sum of \$50,000 and \$140,000.

28 Section 588FA defines what is an "unfair preference". A transaction will relevantly be an unfair preference if: the company and the creditor are parties to it; and it results in the creditor receiving from the company more than the creditor would receive in respect of an unsecured debt if the transaction were set aside and the creditor "were to prove for the debt in a winding up of the company"⁴⁵. Two observations should be made. The Amended Special Case does not concede that any payments made to the appellant are unfair preferences. Rather, this again has been assumed for the purposes of answering the question reserved for consideration by the Full Court. Secondly, s 588FA is directed at what might have been provable in the winding up. Of necessity, for the reasons already given, that means that it is concerned with a transaction that is an unfair preference entered into before the commencement of the winding up.

29 Section 588FI applies where a creditor receives an unfair preference from a company and at the request of the company's liquidator, because of an order under

43 *Williams v Lloyd* (1934) 50 CLR 341 at 373-374 per Dixon J; *Brady v Stapleton* (1952) 88 CLR 322 at 333 per Dixon CJ and Fullagar J.

44 See the definition of "relation-back day" in ss 9, 91.

45 Section 588FA(1) of the Act.

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s 588FF, or for any other reason, the creditor has put the company in the same position as if the transaction had not been entered into. Where s 588FI is engaged, the "creditor may prove in the winding up as if the transaction had not been entered into"⁴⁶. This section reflects the well-established position under the former companies legislation that a creditor who receives an unfair preference cannot prove in the winding up of a company until it has repaid the amount preferentially paid to it in full⁴⁷. It is also an exception to the principle enshrined in s 553 that only debts and claims which existed before the commencement of the winding up are provable.

Key features of the statutory scheme

30 Five features of the foregoing statutory scheme of liquidation should be emphasised.

31 First, the liquidator is given power and responsibility to identify and gather in the assets of the company for distribution to creditors and contributories. Secondly, the liquidator is also obliged to distribute those assets by the making of priority payments and then on a *pari passu* basis by paying creditors and contributories. Thirdly, a bright line is drawn to enable the liquidator to determine what debts are payable by the company and what claims must be met against it; here it is those arising from "circumstances" which existed "before" the date of winding up. Fourthly, in aid of the duty to gather in the assets of the company, the liquidator may recover preference payments as a debt owed to the company. Finally, in determining what debts are payable and what claims must be met, a set-off must take place between what is due as between the company and another person arising from "mutual credits, mutual debts or other mutual dealings".

The appellant's case

32 The appellant submitted that it was entitled to set off its potential liability said to arise under s 588FF(1)(a) against amounts owing to it by MJ Woodman because there had been a mutual dealing between it and that company. That mutual dealing was said to include the trading transactions which had taken place during the relation-back period for which the appellant had been paid by MJ Woodman – the alleged unfair preferences. The liability under s 588FF(1)(a) will arise because

46 Section 588FI(3) of the Act.

47 *N A Kratzmann Pty Ltd (In liq) v Tucker [No 2]* (1968) 123 CLR 295 at 297 per McTiernan, Taylor and Menzies JJ. See also *Re Force Corp Pty Ltd (In liq)* (2020) 149 ACSR 451 at 474 [95] per Gleeson J.

of those voidable transactions; when this liability crystallises, it was said, an account will therefore need to be taken of it as against the remaining amount owed to the appellant for the purposes of s 553C(1). The appellant, in that respect, emphasised that its future liability under s 588FF(1)(a) was no different to any other claim owed to the company precisely because, for the reasons given in *Linter Textiles*, when it is paid, the company will receive it beneficially.

33 It was said that it did not matter that, as at the date of the commencement of the winding up, that liability had not yet sprung into existence. It was sufficient, the appellant submitted, that it existed as a contingent liability which might in the future mature into an actual present liability. Relevantly, the essential contingencies were said to be the bringing of an action by the liquidator under s 588FF(1) and the court's satisfaction that there had been a voidable transaction for the purposes of s 588FE of the Act which justified an order obliging the appellant to pay MJ Woodman. All of the facts necessary to make good those contingencies, including satisfaction of ss 588FE, 588FC and 588FA, existed as at the date the company was wound up.

34 The appellant relevantly relied upon three authorities of this Court in support of the foregoing submissions. The first was *Gye*⁴⁸, which, as mentioned above, concerned the equivalent right of set-off conferred by s 86 of the *Bankruptcy Act*. That provision, like s 553C(1), required the existence of "mutual credits, mutual debts or other mutual dealings" between a bankrupt and a creditor. This Court emphasised that in order to do "substantial justice" it was necessary to give s 86 the "widest possible scope"⁴⁹. Consistently with this, the term "mutual dealings" was introduced into the *Bankruptcy Act* to avoid merely technical outcomes. This Court said⁵⁰:

"The introduction of the reference to 'other mutual dealings' in bankruptcy set-off provisions such as s 86 was intended both to give a more extended right of set-off and to ensure that the intended scope of such

48 (1991) 171 CLR 609.

49 (1991) 171 CLR 609 at 619 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, quoting *Day & Dent Constructions Pty Ltd v North Australian Properties Pty Ltd* (1982) 150 CLR 85 at 108 per Mason J, in turn quoting *Eberle's Hotels and Restaurant Company v Jonas* (1887) 18 QBD 459 at 465 per Lord Esher MR.

50 (1991) 171 CLR 609 at 623 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

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provisions was not frustrated by a narrow or technical approach to what constituted 'credits' or 'debts'".

35 The word "dealings" thus extended to "matters having a commercial or business flavour"⁵¹. Its meaning extended to "the communings, the negotiations, verbal and by correspondence, and other relations which occur or exist in" any commercial or business setting⁵². No reason existed, the appellant said, for the adoption of a different approach when applying s 553C(1).

36 The appellant submitted that it was important that, in *Gye*, this Court also recognised that it was sufficient if the mutual dealing was one which was "capable of giving rise to" claims in the future which might be eligible to be set off⁵³. The word "mutual", in that respect, conveyed the notion of "reciprocity rather than that of correspondence"⁵⁴.

37 Here, it was submitted by the appellant that each of the three aspects required by *Gye*, referred to above⁵⁵, was satisfied. First, the transactions which had taken place during the relation-back period were between the same parties. Secondly, the benefit or burden of the dealings lay in the same interests because the company and the creditor are owed monies which, when paid, will be received beneficially. This aspect of the requirement of mutuality was limited, it was contended, to asking whether the parties would receive the benefit of any payment beneficially or in the capacity of a trustee. This aspect of the requirement of mutuality will need to be revisited. Thirdly, the liability of MJ Woodman and that which will arise under s 588FF(1)(a) both sound in money.

51 (1991) 171 CLR 609 at 625 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

52 (1991) 171 CLR 609 at 625 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

53 (1991) 171 CLR 609 at 623 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

54 (1991) 171 CLR 609 at 623 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

55 See [19].

38 The second case relied upon by the appellant was *Hiley v Peoples Prudential Assurance Co Ltd*⁵⁶. The majority decided that the appellant (Mr Hiley) was entitled – pursuant to s 82 of the *Bankruptcy Act 1924* (Cth), as applied to companies at that time by s 264 of the *Companies Act 1899* (NSW) – to set off an amount, payable by way of damages to him by the respondent company in liquidation, against amounts previously owing by him to the company which had been secured by a mortgage.

39 For the purposes of deciding whether there have been mutual debts, mutual credits or mutual dealings, Dixon J said that "the decisive date is that of the commencement of the winding up"⁵⁷. This proposition was critical to the appellant's case that one is not confined to looking at claims arising *before* the start of a winding up. His Honour explained why the commencement date was decisive in the following terms⁵⁸:

"At that date the assets of the company, including the choses of actions or claims of the company, become a fund in the hands of a liquidator, and the liabilities of the company are converted into claims upon that fund. The rights and liabilities of the persons liable to contribute to the fund and of those entitled to share in its distribution are to be ascertained as at that time."

40 The foregoing explanation, however, demonstrates that when Dixon J referred to the "commencement" of the winding up, his Honour in fact was referring to the moment immediately before the commencement of the winding up. That is made even more clear in the following passage in which Dixon J observed that new claims for and against a company, arising *after* the start of winding up, could not be the subject of any set-off against previous claims. His Honour said⁵⁹:

"In the course of administering the assets, the liquidator may find it necessary to create new claims upon the fund which thus may chance to be depleted. But liabilities incurred by the liquidator on behalf of the company are of a different order and they in no way disturb the mode or proportion in which the claims of the creditors existing at the date of liquidation share in the assets remaining available to answer their claims. In the same way,

56 (1938) 60 CLR 468.

57 (1938) 60 CLR 468 at 495-496.

58 (1938) 60 CLR 468 at 496.

59 (1938) 60 CLR 468 at 496.

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the acquisition by the liquidator on behalf of the company of new claims against others cannot vary the rights of creditors antecedently existing. If a liquidator in the course of the winding up sells assets of the company to a purchaser, who happens also to be a proving creditor, the purchaser cannot set off the purchase price against the debt for which he is entitled to prove."

41 The parts of *Hiley* relied upon by the appellant must be considered in light of the foregoing reasoning. Dixon J decided that the liabilities in *Hiley* were not "new" because they each arose out of "rights or claims subsisting at the commencement of the winding up"⁶⁰. That was sufficient. As his Honour said⁶¹:

"[T]he general rule does not require that at the moment when the winding up commences there shall be two enforceable debts, a debt provable in the liquidation and a debt enforceable by the liquidator against the creditor claiming to prove. It is enough that at the commencement of the winding up mutual dealings exist which involve *rights and obligations* whether absolute or contingent of such a nature that afterwards in the events that happen they mature or develop into pecuniary demands capable of set off. If the end contemplated by the transaction is a claim sounding in money so that, in the phrase employed in the cases, it is commensurable with the cross-demand, no more is required than that at the commencement of the winding up liabilities shall have been contracted by the company and the other party respectively from which cross money claims accrue during the course of the winding up". (emphasis added)

42 Relying on the foregoing reasons, the appellant contended that as at the commencement of the winding up here, it was contingently liable to MJ Woodman under s 588FF(1)(a), in the sense described above. Just like the causes of action in *Hiley*, it was submitted, the liquidator's contingent right to sue under s 588FF(1)(a) was one which over time would "grow" or "mature" into a money claim or pecuniary demand⁶². Critically, it was accepted that no such contingent right or obligation could have existed *before* the commencement of the winding up.

⁶⁰ (1938) 60 CLR 468 at 499.

⁶¹ (1938) 60 CLR 468 at 496-497; see also at 487 per Rich J, 491 per Starke J.

⁶² (1938) 60 CLR 468 at 487 per Rich J, 497 per Dixon J.

43 The third authority relied upon by the appellant was *Day & Dent Constructions Pty Ltd v North Australian Properties Pty Ltd*⁶³. In that case, one of the liabilities to be set off comprised, as at the commencement of the winding up, a guarantee which thereafter might or might not have been called upon. It was said that there was only a possibility that the guarantee might need to be performed. But that was sufficient. Mason J (with whom Stephen J and Aickin J agreed) said⁶⁴:

"After default, the possibility remains that the principal debtor may himself discharge his liability to the principal creditor. Until the surety makes payment he (the surety) is owed no debt at all. But this does not matter. The important factor is that, by virtue of a guarantee given before bankruptcy or liquidation as the case may be, the surety has undertaken an obligation which on payment to the principal creditor will result in a debt owing to him (the surety) by the principal debtor. There is no reason why the liability thus undertaken, once payment is made, should not ground the right to set off the debt created by the payment."

44 Finally, the appellant also relied upon the Australian Law Reform Commission's 1988 report entitled "General Insolvency Inquiry" (more commonly known as the "Harmer Report"). It was common ground that the Harmer Report led to the introduction of s 553C⁶⁵. Amongst other things, it recommended that the "situations for excluding a right of set-off should correspond to the situations where a transaction may be avoided on the basis that it is preferential"⁶⁶. Yet, no such simple exclusion for liabilities that arise because a transaction was voidable for the purposes of s 588FF was ever enacted. This Court was asked to infer from this omission that a legislative choice had been made to permit a set-off where, as here, liability arises under s 588FF(1)(a). It was then said that Parliament had considered the possibility of the right of set-off being abused but had chosen to address that concern only by the enactment of s 553C(2) and nothing else. That provision denies a set-off where at the time of the mutual dealing the creditor had "notice of the fact that the company was insolvent".

63 (1982) 150 CLR 85.

64 (1982) 150 CLR 85 at 108-109; see also at 95-96 per Gibbs CJ, 109 per Murphy J.

65 See *Corporate Law Reform Act 1992* (Cth), s 92.

66 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) at 330 [818].

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Mutual credits, mutual debts and mutual dealings

45 The appellant's case turned upon the presence as at the date of the commencement of the winding up of an inchoate or contingent right to sue under s 588FF(1) which was capable of growing or maturing into a money claim that could then be set off against the amount owed by MJ Woodman to it. That proposition suffers from a fatal flaw. Construed in the context of the statutory scheme of liquidation, s 553C(1) requires that the mutual credits, mutual debts or other mutual dealings be credits, debts or dealings arising from circumstances that subsisted in some way or form before the commencement of the winding up. That is because under that statutory scheme, s 553C exists in aid of s 553, which is concerned with debts and claims, whether "present or future, certain or contingent, ascertained or sounding only in damages", arising from "circumstances" that had occurred *before* the commencement of the winding up. That is why s 553C(1) refers to a "person who wants to have a debt or claim admitted against the company" and then provides that only the balance of any set-off is "admissible to proof against the company, or is payable to the company, as the case may be". As such, the function and purpose of s 553C is to permit a reckoning of amounts owing to and by the company during the relation-back period prior to the appointment of the liquidator.

46 Here, immediately before the commencement of the winding up there was nothing to set off as between the appellant and MJ Woodman; the company owed money to the appellant, but the appellant owed nothing to the company. Moreover, the inchoate or contingent capacity held by the liquidator to sue under s 588FF could not and did not exist before then⁶⁷. It could only be made following the commencement of the winding up. It was wholly "new" in the sense described by Dixon J in *Hiley*. It sprang into existence as a specific statutory right held by the liquidator for the purposes of recovering preference payments to secure the equitable distribution of assets amongst creditors. As such, it was not eligible to be set off against the pre-existing amount owed to the appellant.

47 It follows that the appellant could not identify a relevant mutual dealing. Contrary to its contentions, neither the trade transactions which were undischarged by MJ Woodman during the relation-back period nor, for the reasons already expressed, the discharged trade transactions (giving rise to the liabilities of \$50,000 and \$140,000), together with the liability which may arise under s 588FF(1)(a), were mutual dealings. Section 553C(1), correctly construed, does

67 See s 588FF(3) of the Act.

not address dealings which straddle the period before and after the commencement of the winding up.

48 Contrary to the appellant's submissions, *Hiley* does not otherwise assist it. What existed *before* the winding up in that case was the cause of action for the re-transfer of the mortgage over Mr Hiley's land and Mr Hiley's rights under his contract of life assurance, the latter of which, when repudiated upon the making of the winding up order, gave rise to a provable claim for unliquidated damages⁶⁸. In contrast, here the liquidator's right to sue for an order under s 588FF(1), arising from the commencement of the winding up, was not, and never could be, "payable to the company" for the purposes of s 553C(1) and s 553 more generally, for the reasons set out above.

49 Moreover, as at the date of the commencement of the winding up, the liquidator did not hold any vested or contingent "right" and the appellant owed no "obligation", in the sense in which those words were used in *Hiley* (as set out in the passage above⁶⁹), which together might have constituted a mutual dealing of some kind. In order that a liability be characterised as contingent, there must be, at the time of winding up, an existing obligation out of which, on the happening of a future event, an obligation to pay a sum of money will arise⁷⁰. At most, the liquidator held an expectancy, unsupported by any underlying right or obligation which pre-existed the liquidation, which might at some point grow into a money claim of some kind⁷¹. In that respect, this case is unlike that of *Day & Dent* where, as at the commencement of the winding up, vested rights existed under a guarantee given previously. By reason of the guarantee, the surety, to use the language of Mason J, had "undertaken an obligation" which on payment to the principal creditor would result in a debt owing to the surety by the principal debtor. The

68 *Hiley v Peoples Prudential Assurance Co Ltd* (1938) 60 CLR 468 at 493 per Dixon J.

69 See [41].

70 *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455 at 459 per Kitto J, quoting *In re William Hockley Ltd* [1962] 1 WLR 555 at 558 per Pennycuik J; [1962] 2 All ER 111 at 113; *National Bank of Australasia Ltd v Mason* (1975) 133 CLR 191 at 200-201 per Barwick CJ. See also Derham, "Set-off against statutory avoidance and insolvent trading claims in company liquidation" (2015) 89 *Australian Law Journal* 459 at 480.

71 cf *National Bank of Australasia Ltd v Mason* (1975) 133 CLR 191 at 200-201 per Barwick CJ.

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ability to sue for an order under s 588FF conferred no equivalent "right" or "obligation"; rather, conditioned as it was on both the liquidator's decision to sue and the court's satisfaction that the elements of s 588FE(2) had been satisfied, it rose no higher, as at the commencement of the winding up, than a mere possibility without more⁷². That is not sufficient⁷³.

50 It follows that under the statutory scheme of liquidation, any liability arising from the making of an order by a court under s 588FF(1)(a) cannot form part of the process for the identification of provable debts and claims for the purposes of s 553, and thus cannot be the subject of a valid set-off against pre-existing amounts owed by the company to the preferred creditor for the purposes of s 553C.

51 The foregoing is consistent with the function and purpose of the regime for dealing with voidable transactions in Div 2 of Pt 5.7B of the Act and the regime for the proof and ranking of claims in Div 6 of Pt 5.6 of the Act. The former is directed at the liquidator's duty and capacity to recover preferential payments and at the need to ensure equality in the making of distributions to the same class of creditors. In contrast, the latter is directed at the identification of which debts and claims must be addressed by the liquidator. It would be a gross distortion of the statutory scheme of liquidation if a creditor could, in effect, avoid the consequences of having received a preferential payment by the happenstance that it was also owed money by the company in liquidation. Such an outcome would diminish the pool of assets available for priority payments and rateable distribution. It would permit a preferred creditor to use each dollar owed to it by the company to set off in full each dollar of liability arising from receipt of an unfair preference.

52 In any event, any such liability could not constitute a mutual credit, mutual debt or mutual dealing with the pre-existing amount owed by the company for two further reasons. First, there had been no dealing between the same persons⁷⁴. The alleged unfair preferences were paid during the relation-back period by MJ Woodman to the appellant. The liability created by s 588FF(1)(a), whilst owed to the company (which will receive it beneficially), is nonetheless one that arises

72 cf *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 16 per Dixon CJ, 18-19 per McTiernan J, 20-21 per Menzies J, 26 and 40 per Windeyer J.

73 *National Bank of Australasia Ltd v Mason* (1975) 133 CLR 191 at 200-201 per Barwick CJ.

74 cf *Gye v McIntyre* (1991) 171 CLR 609 at 623 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

upon the application of the liquidator, who, for the reasons given above, does not do so as an agent of the company but rather in his or her own right as an officer of the court⁷⁵.

53 Secondly, there is no mutuality of interest⁷⁶. Contrary to the contentions of the appellant, that consideration is not confined to determining whether both parties are beneficially or legally entitled to what they are owed. As the Court of Appeal of the Supreme Court of Western Australia recently observed, a consideration of the benefit of equitable interests in a transaction is but an example of when two parties can enjoy mutuality of interest⁷⁷.

54 Here, on no view can it be said that the entire amount which the liquidator will recover under s 588FF(1)(a) will be "for his own benefit" or indeed for the benefit of MJ Woodman. That is because, for the reasons expressed above, that amount must be applied under the statutory scheme of liquidation and be made available, amongst other things, for the making of priority payments and for distribution to creditors in accordance with the *pari passu* principle. Given the obligations and duties imposed by the statutory scheme, it cannot be said that the interest the appellant has in being paid by MJ Woodman is the same as the interest of both the liquidator and the company in recovering the preferential payment. The liquidator's right of recovery is not comparable to a trading transaction whereby goods or services have been previously supplied to a company; it is a unique statutory ability to recover the proceeds of a voidable transaction.

55 Moreover, the fact that the statutory scheme of liquidation sufficiently provides for the winding up of a company without the need for equitable intervention does not support a conclusion that the interest of the company in receipt of a s 588FF(1)(a) payment is the same as that of the preferred creditor. To the contrary, it is precisely the presence of that detailed scheme that denies mutuality of interest.

75 cf *Lister v Hooson* [1908] 1 KB 174.

76 cf *Gye v McIntyre* (1991) 171 CLR 609 at 623 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

77 *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (In liq) (Receivers and Managers Appointed)* (2018) 53 WAR 325 at 351-352 [84] per Murphy and Mitchell JJA and Allanson J.

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56 To the extent that the cases of *Re Parker*⁷⁸, *Buzzle Operations Pty Ltd (In liq) v Apple Computer Australia Pty Ltd*⁷⁹, *Shirlaw v Lewis*⁸⁰, *Hall v Poolman*⁸¹ and *Stone v Melrose Cranes & Rigging Pty Ltd [No 2]*⁸² are inconsistent with the above analysis, they should now be considered to be wrongly decided.

57 Nor, again, does the appellant's reliance upon the Harmer Report assist it. The decision said inferentially to have been made by Parliament not to enact, as part of s 553C, an express exclusion for voidable transactions may have taken place because, for the reasons set out in this judgment, no such exclusion was ever needed.

58 The presence of s 588FI within the statutory scheme of liquidation supports the outcome here. It will be recalled that this section applies when a creditor who has received an unfair preference has "put the company in the same position as if the transaction had not been entered into"⁸³. The creditor may then prove in the winding up as if the transaction had not been entered into⁸⁴. Permitting a preferred creditor to set off its liability under s 588FF(1)(a) with the liability owed to it by the company would undermine a purpose of the recovery of unfair preferences, revealed by this section, which is to restore to the pool of distributable assets those payments made under voidable transactions. A set-off, in contrast, would leave that pool diminished, for the reasons already expressed. Such an outcome can hardly have been intended.

59 The appeal should be dismissed.

78 (1997) 80 FCR 1.

79 (2011) 81 NSWLR 47 at 81 [278] per Young JA; see also at 50 [2] per Hodgson JA, 81 [287] per Whealy JA.

80 (1993) 10 ACSR 288 at 295-296 per Hodgson J.

81 (2007) 65 ACSR 123 at 215-217 [415]-[431] per Palmer J.

82 (2018) 125 ACSR 406 at 479-481 [279]-[283] per Markovic J.

83 Sub-section (1)(b).

84 Sub-section (3).

Costs

60 As mentioned above, the Full Court of the Federal Court ordered that the costs of the Amended Special Case be reserved for determination by the docket judge upon the resolution of all of the outstanding issues between the parties. That was because the appellant had two further defences which have yet to be resolved. If those defences are successful, then, as the Full Court acknowledged, "the special case, while fully argued, may be of no moment as between the parties (though of significance to insolvency practice generally in Australia)"⁸⁵. In such circumstances, the Full Court recognised that the success or failure of those further defences would bear upon the issue of costs. That conclusion should not be disturbed. Moreover, it also justifies an order that the costs of this appeal should be costs in the cause so that the costs can follow resolution of all yet to be determined questions, including whether the litigation should be treated as public interest litigation.

Conclusion

61 For these reasons, the appeal should be dismissed, with costs in the cause.

85 *Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd v Metal Manufactures Pty Ltd [No 2]* [2022] FCAFC 1 at [8] per Allsop CJ, Middleton and Derrington JJ.

62 GAGELER J. The question reserved for the consideration of the Full Court of the Federal Court of Australia was properly framed by reference to rights in issue in the ongoing proceeding in the Federal Court in which a liquidator (the first respondent in this Court) claims against a creditor (the appellant in this Court) an order, under s 588FF(1)(a) of the *Corporations Act 2001* (Cth) ("the Act"), directing the creditor to repay to a company in liquidation (the second respondent in this Court) an amount equal to amounts that the company paid to the creditor in transactions which the liquidator claims to have been voidable because of s 588FE of the Act on the basis of those payments having been unfair preferences and insolvent transactions within the meanings of s 588FA and s 588FC of the Act.

63 Informing the answer to that question about specific rights in issue in the ongoing proceeding is an examination of the general question of statutory construction on which the outcome of this appeal turns. Does s 553C of the Act entitle a creditor to set off an amount equivalent to that received as an unfair preference in repayment of a debt, which the creditor is ordered under s 588FF(1)(a) of the Act to repay to a company in liquidation, against the amount of another debt which the creditor can prove in the winding up of the company?

64 To be observed at the outset is that the consequence of the creditor being entitled to set off the two amounts would be at odds with the scheme of Pt 5.6 of the Act, of which s 553C forms part. Within a system of winding up in which unsecured creditors of an insolvent company in liquidation generally rank *pari passu* in the distribution of the property of the company⁸⁶, an unfairly preferred creditor – who has by definition engaged in a transaction by which the creditor has received from the company more than the creditor would receive if the transaction were set aside and the creditor were to prove for the debt in the winding up of the company⁸⁷ – would be entitled to rely on the unfair preference to improve that creditor's position in relation to other creditors.

65 In the Full Court⁸⁸, Allsop CJ illustrated that consequence through a simple hypothetical example. The example assumes a creditor who has two debts each of \$100 and who is unfairly preferred as to one in full. If the creditor is obliged by an order under s 588FF(1)(a) of the Act to repay the amount of the preferred debt in full, the property of the company available for distribution amongst all creditors is increased by \$100. Upon repayment, the creditor can prove in the distribution for \$200 as if the unfair preference had not occurred⁸⁹. If, however, s 553C of the Act

86 See s 555 of the Act.

87 See s 588FA(1)(b) of the Act.

88 See *Morton v Metal Manufactures Pty Ltd* (2021) 289 FCR 556 at 565-566 [31].

89 See s 588FI of the Act.

entitles the creditor to set off the amount ordered to be repaid under s 588FF(1)(a), the creditor automatically receives the functional equivalent of 50 cents in the dollar. Given that s 553C is self-executing⁹⁰, that occurs without the creditor needing to prove in the liquidation at all.

66 I agree with the joint reasons for judgment that the correct answer to the question of statutory construction is that s 553C of the Act does not entitle the creditor to such a set-off, that the Full Court accordingly gave the right answer to the question reserved for its consideration, that this appeal must therefore be dismissed, and that the costs of this appeal should be costs in the ongoing proceeding in the Federal Court.

67 I write to address an aspect of the concept of mutuality which is employed in the references to "mutual credits, mutual debts or other mutual dealings" in s 553C of the Act. The concept was central to the reasoning of the Full Court.

68 Though ancient, the concept of mutuality employed in those references is statutory. The concept must be understood purposively within the statutory context in which it is employed.

69 The purpose of s 553C of the Act, like that of s 86 of the *Bankruptcy Act 1966* (Cth) on which it is modelled, is to prevent a creditor of an insolvent company who is also a debtor of that company being required to pay the full amount of the debt owed to the company and yet being entitled to receive only a fraction of the credit due from the company where that would result in substantial injustice⁹¹. With the object of confining the availability of set-off to circumstances where payment of the full amount of the debt without entitlement to the full amount of the credit would result in substantial injustice to a creditor, as distinct from unfairness to other creditors, the concept of mutuality has long been understood to entail that the burden of the debt and the benefit of the credit must lie in the same "equitable or beneficial interests"⁹².

70 At the core of the argument of the appellant before the Full Court and in this appeal was the proposition that the analysis of interests in the context of

90 *Re Hawden Property Group Pty Ltd (In liq)* (2018) 125 ACSR 355 at 360-361 [29].

91 *Gye v McIntyre* (1991) 171 CLR 609 at 618-619.

92 *Gye v McIntyre* (1991) 171 CLR 609 at 623. See also *Coventry v Charter Pacific Corporation Ltd* (2005) 227 CLR 234 at 254-255 [56]. See earlier *Hiley v Peoples Prudential Assurance Co Ltd* (1938) 60 CLR 468 at 497; *Forster v Wilson* (1843) 12 M & W 191 at 203-204 [152 ER 1165 at 1170-1171].

assessing mutuality must be confined to a consideration of interests enforceable in equity. The proposition was correctly rejected by Allsop CJ in the Full Court⁹³.

71 To confine the analysis to a consideration of interests enforceable in equity would be to adopt an unduly narrow conception of "beneficial interests" which would divorce the statutory inquiry into mutuality from the statutory object of avoiding substantial injustice. Just as it is important always to recognise that an interest of a beneficiary of a trust "is not carved out of a legal estate but impressed upon it"⁹⁴, as a restriction on the manner in which the trustee may deal with trust property⁹⁵, it is important to recognise that legislation can impose restrictions on dealings with property for the benefit of persons other than the legal owner without occasion arising for any intervention of equity at all.

72 Whilst the making of an order for the winding up of a company in insolvency under Div 1 of Pt 5.4 of the Act does not result in property of the company becoming held on trust⁹⁶, it does result in dealings with property of the company thereafter being restricted by the scheme of Div 6 of Pt 5.6 of the Act to dealings for the purposes of the winding up⁹⁷. Section 588FF(1)(a) is located within Pt 5.7B of the Act, which is accordingly described in its heading as being concerned with "[r]ecovering property or compensation for the benefit of creditors of insolvent company". An order under s 588FF(1)(a) of the Act can only be sought by a liquidator in the context and for the purposes of the winding up, and an amount to be paid pursuant to such an order must be paid to the company to be dealt with as property of the company in the winding up as governed by Div 6 of Pt 5.6 of the Act. The amount is not one which is or ever could be recovered by the company itself, or which is or ever could be paid to the company for the benefit of the company alone.

93 *Morton v Metal Manufactures Pty Ltd* (2021) 289 FCR 556 at 572 [55], 598-599 [147]-[151], 600 [153]. See also Derham, "Set-off against statutory avoidance and insolvent trading claims in company liquidation" (2015) 89 *Australian Law Journal* 459 at 469-476.

94 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 474; *Boensch v Pascoe* (2019) 268 CLR 593 at 599 [4].

95 *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* (2019) 268 CLR 524 at 560-561 [82]. See also *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36 at [58].

96 *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 612-613 [54]-[55], 634 [127].

97 cf *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 614 [58].

73 Hence, the right conferred on the liquidator to apply for an order under s 588FF(1)(a) of the Act is a statutory right "given for the benefit of the general body of creditors"⁹⁸ and recovery of an amount pursuant to such an order, if made, "inures wholly for the benefit of the persons who will participate under the winding-up"⁹⁹.

74 There is accordingly no mutuality of interest between an amount of an unfair preference which a creditor is ordered under s 588FF(1)(a) of the Act to repay to a company in liquidation and a debt incurred by the company provable by the creditor in the winding up of the company.

98 *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407 at 428.

99 *Morton v Metal Manufactures Pty Ltd* (2021) 289 FCR 556 at 595-599 [143]-[151], quoting *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2014) 87 NSWLR 728 at 749 [128].