

HIGH COURT OF AUSTRALIA

GAGELER CJ,
EDELMAN, STEWARD, GLEESON AND BEECH-JONES JJ

JOHN MAXWELL MORGAN & ORS

APPELLANTS

AND

McMILLAN INVESTMENT HOLDINGS
PTY LTD & ANOR

RESPONDENTS

Morgan v McMillan Investment Holdings Pty Ltd

[2024] HCA 33

Date of Hearing: 12 June 2024

Date of Judgment: 11 September 2024

S119/2023

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

M R Pesman SC with M L Rose for the appellants (instructed by ERA Legal)

B W Walker SC with J T Svehla for the first respondent (instructed by Somerset Ryckmans)

Submitting appearance for the second respondent

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

CATCHWORDS

Morgan v McMillan Investment Holdings Pty Ltd

Companies – Winding up – Insolvency – Appeal against making of pooling order under s 579E(1) of *Corporations Act 2001* (Cth) – Whether gateway requirement in s 579E(1)(b)(iv) for making of pooling order satisfied – Whether alleged chose in action owned jointly and severally by two companies is particular property used, or for use, in connection with joint business, scheme or undertaking – Whether alleged chose in action is used or available for use by two or more companies – Whether alleged chose in action concerning sale agreement for disposal of joint business has sufficient connection to undertaking or carrying out of joint business – Whether alleged chose in action arose upon entry into sale agreement – Where company reinstated after deregistration – Whether s 601AH(5) of *Corporations Act* deems company to have undertaken activities during period of deregistration.

Words and phrases – "carrying on of the joint business, scheme or undertaking", "chose in action", "deregistration", "gateway requirement", "group of 2 or more companies", "joint ownership or operation of property", "just and equitable", "material disadvantage to any eligible unsecured creditor", "money had and received", "necessary connection", "ownership or operation of any asset jointly or for joint benefit", "particular property", "pooling order", "reinstatement", "sufficient connection".

Corporations Act 2001 (Cth), ss 579E(1), 579E(1)(b)(iii), 579E(1)(b)(iv), 579E(2), 601AD(1), 601AD(2), 601AH, 601AH(5).

Introduction

1 A "pooling order" is an order made by a court under s 579E(1) of the *Corporations Act 2001* (Cth) which permits the assets and liabilities of a group of companies in liquidation to be pooled for the general benefit of the companies' unsecured creditors, instead of the ordinary application of separate entity principles to the simultaneous liquidation of companies within the group. The order is made in relation to two or more companies where all companies are being wound up, a gateway requirement is established, the court is satisfied that the pooling order is "just and equitable", and no prohibition exists on making the order. The effects of a pooling order include each company in the pooled group being taken to be jointly and severally liable for the debts of each other company and intercompany debts within the pooled group being extinguished.¹

2 The primary judge in the Federal Court of Australia (Rares J) treated two companies as a group (having reinstated one of them), and made a pooling order under s 579E(1) of the *Corporations Act*. The primary judge was satisfied that a gateway requirement for a pooling order had been established. The affairs of the two companies were significantly intermingled and his Honour concluded that it was "just and equitable" that a pooling order be made and that the order was not prohibited, as it would be if, for example, there were a material disadvantage to any eligible unsecured creditor of either company.²

3 Section 579E(1) provides for a number of alternative gateways before a court can consider whether it is satisfied that it is just and equitable to make a pooling order. This appeal concerns one of them. The gateway found by the primary judge to have been satisfied, and with which this appeal is concerned, is contained in s 579E(1)(b)(iv), which requires that "one or more companies in the group own particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group".

4 A majority of the Full Court of the Federal Court (Yates J and Beach J; Markovic J dissenting) allowed an appeal by a creditor company. The majority held that the gateway in s 579E(1)(b)(iv) was not satisfied and that the pooling

1 *Corporations Act 2001* (Cth), s 579E(2).

2 *Corporations Act*, ss 579E(1), 579E(10)(a)(i), see also s 579E(10)(b)(ii).

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order should not have been made. For the reasons below, the majority was correct and the appeal should be dismissed.

Background

The parties

5 The first appellant, Mr Morgan, is the liquidator of the second and third appellants, Sydney Allen Printers Pty Ltd (In Liquidation) and Sydney Allen Manufacturing Pty Ltd (In Liquidation), described respectively as "SAP" and "SAM". The first respondent, McMillan Investment Holdings Pty Ltd ("MIH"), was a secured creditor of both SAP and SAM. The second respondent, the Australian Securities and Investments Commission ("ASIC"), submits to any order made by this Court, save as to costs.

6 The principals of MIH were Mr McMillan and his daughter Ms McMillan. The McMillans are not parties to this litigation but they are alleged by Mr Morgan to have become involved in the management of SAP and SAM following MIH becoming a secured creditor of the companies. Mr Morgan alleges that the involvement of the McMillans was such as to render them shadow directors of SAP and SAM.

The business: administration, liquidation and deregistration

7 SAP and SAM operated a colour printing business. SAP ordered supplies for the business and did all the printing work. In about late 2013, SAP employed about 80 staff. SAM owned, or had rights over, the equipment used in the business including expensive printing presses. SAM created credit facilities which SAP used to order supplies. SAP paid creditors in the course of operating the business. However, entries in the internal accounts between SAP and SAM indicated that SAP paid the creditors on behalf of SAM.

8 On 7 April 2016, administrators were appointed to SAP and, as part of a creditors' voluntary winding up, liquidators were appointed to SAM. On 13 May 2016, liquidators were appointed to SAP. In each case, the joint administrators or liquidators of SAP and SAM were Mr Morgan and Mr Davis.

9 On 5 April 2018, Mr Davis sought the deregistration of SAM by ASIC on the basis that no funds were left in the creditors' voluntary liquidation and that the affairs of SAM had been fully wound up. On 10 June 2018, ASIC deregistered

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SAM with the effect that SAM ceased to exist and its property (other than any property held on trust) vested in ASIC.³

10 On 14 February 2020, Mr Davis retired as a liquidator of SAP. Mr Morgan became the sole liquidator of SAP.

The transactions relevant to this appeal

11 On 27 March 2015, MIH entered into a finance facility with SAP and SAM (which were described together as "the borrower"). Clause 3.6 of the finance facility made SAP and SAM jointly liable for all amounts due in respect of the principal sum and uncapitalised interest.

12 On 7 April 2016, when SAM was placed into liquidation, the records of SAP and SAM showed that SAM owed SAP more than \$1 million. The primary judge observed that this debt had been recorded in spite of the fact that SAM did not appear to have received any, or any sufficient, remuneration from SAP for the provision of SAM's machinery and credit facilities.

13 On 13 April 2016, a receiver and manager ("the Receiver") was appointed to SAP under the MIH finance facility and on 2 May 2016 the Receiver was also appointed as receiver and manager to SAM.

14 On 4 May 2016, the Receiver, SAP and SAM entered an agreement with Print Warehouse Australia Pty Ltd ("Print Warehouse") to sell, as a going concern, the assets and business operated by SAP and SAM for \$1.3 million. The agreement defined the "Seller" as SAP and SAM collectively. No provision was made for distribution of the \$1.3 million between SAP and SAM. The sale included the business names, goodwill, intellectual property and the printing presses and other equipment. The agreement was expressed to be GST exempt as "the sale of a business as a going concern".

15 The "Commencement Date" of the agreement was stated in cl 1.1 as 5 May 2016. At that stage SAM was in liquidation but SAP was not. Completion of the agreement was to take place eight weeks after payment of the deposit by Print Warehouse. Completion occurred on 1 July 2016 (when both SAP and SAM were in liquidation).

3 Corporations Act, s 601AD(1) and (2).

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16 In Mr Morgan's affidavit evidence at trial he exhibited correspondence from MIH's lawyer which suggested that, at an unspecified time, a "much stronger" offer had been made to the Receiver by Print Warehouse. The correspondence said, however, that the "purchase price was reduced at the last minute and [the principals of MIH] agreed to the reduced purchase price". Mr Morgan's affidavit evidence also exhibited an invoice, apparently dated 4 May 2016 and described by the primary judge as "curious", from a company (McMillan Group Services Pty Ltd or "MGS") associated with MIH to Print Warehouse for \$330,000, including GST. The invoice was on prepaid terms with the description "[t]o our costs in relation to services provided in connection with printing plant and equipment".

17 MIH gave no evidence at trial in relation to the \$330,000 invoice or any dealing to which it could relate. Mr Morgan's allegation was that the \$330,000 invoice (including GST) represented a payment to MGS of \$300,000 of the funds that would otherwise have been included in the purchase price due to SAP and SAM. The "true" purchase price, Mr Morgan submitted, would have been \$1.6 million.

Mr Morgan seeks to reinstate SAM and to obtain a pooling order

18 The plaintiffs at trial were Mr Morgan and SAP. After the reinstatement of SAM by order of the primary judge, Mr Morgan, SAP and SAM were respondents before the Full Court and are now appellants before this Court. It is convenient to refer only to Mr Morgan since, as liquidator, he acted for the benefit of SAP and SAM.

19 Before the primary judge, Mr Morgan sought orders for the reinstatement of SAM under s 601AH of the *Corporations Act* and for the pooling of SAP and SAM under s 579E(1). In circumstances in which the affairs of SAP and SAM had been substantially intermingled, Mr Morgan sought those orders so that he could bring claims against various third parties. One of the claims was against MGS for recovery of the \$330,000 which Mr Morgan alleged was paid by Print Warehouse to MGS, and which was said to be part of the proceeds that would have been received from the sale of the business of SAP and SAM, if the purchase price had not been reduced.

20 On 2 December 2021, the primary judge made orders for the reinstatement of SAM, and the appointment of Mr Morgan as SAM's liquidator. Those orders were not the subject of any separate challenge on appeal. In relation to the pooling order, there were three issues before the primary judge.

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21 First, there was dispute concerning whether a ground or "gateway" had been established for a pooling order. Two gateways were relied upon by Mr Morgan: s 579E(1)(b)(ii) and s 579E(1)(b)(iv). Secondly, there was dispute concerning whether the Court should apply a prohibition on making a pooling order contained in s 579E(10)(a), which arises where a court is satisfied that the order would materially disadvantage an eligible unsecured creditor of a company in the group and the eligible unsecured creditor has not consented to the making of the order. Thirdly, there was dispute concerning whether it was "just and equitable to make a pooling order" within s 579E(12), with the particular focus at trial being upon whether there was sufficient intermingling of the affairs of SAP and SAM.

22 The primary judge resolved all three issues in favour of Mr Morgan and made a pooling order. The primary judge held that the gateway in s 579E(1)(b)(iv) permitted the making of the pooling order due to the existence of a chose in action to seek recovery of money from MGS based on an allegation that the money had been wrongfully paid to that company. His Honour found that SAP and SAM jointly and severally owned the chose in action, and concluded that "SAM and SAP will be able to use" that chose in action in connection with their "undertaking carried on jointly to discharge their debts and conduct recovery of their assets".⁴ Although the primary judge said that the chose in action "is now being used, or will be if SAM is reinstated and a pooling order made", the primary judge identified no basis for the finding as to present use and his Honour's reasons can only be understood as concluding that the gateway in s 579E(1)(b)(iv) was satisfied by the future use of a chose in action in the course of the liquidations, which his Honour considered to be in connection with the joint undertaking of the printing business that had previously been conducted by the companies. His Honour did not, therefore, need to decide whether the gateway in s 579E(1)(b)(ii) could also have permitted the pooling order. The primary judge explained, in a finding that was not challenged on appeal, that it was just and equitable to order pooling in circumstances in which the intermingling of the activities of the businesses of both companies meant that "a pooling order would only advantage creditors of both companies [and that] [t]he effect of the pooling order will eliminate the intercompany balances and claims between SAM and SAP for the use of each company's property".⁵

4 *Morgan v Sydney Allen Manufacturing Pty Ltd (in liq)* [2021] FCA 1669 at [97].

5 *Morgan v Sydney Allen Manufacturing Pty Ltd (in liq)* [2021] FCA 1669 at [104].

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After the reinstatement and pooling order, Mr Morgan commences Supreme Court actions

23 On 18 March 2022, by originating process filed in the Supreme Court of New South Wales, proceedings were commenced by Mr Morgan in his capacity as liquidator of SAP and SAM, and by SAP and SAM. The defendants to those proceedings included MIH, Mr McMillan, Ms McMillan and MGS.

The appeal to the Full Court and to this Court

24 MIH's grounds of appeal to the Full Court were concerned only with whether the gateway in s 579E(1)(b)(iv) was satisfied. Mr Morgan relied on a notice of contention which alleged that the gateway in s 579E(1)(b)(ii) was an additional basis on which a pooling order could be made. A majority of the Full Court (Yates J and Beach J) allowed MIH's appeal and refused an extension of time for Mr Morgan to file the notice of contention. Their Honours, writing separately, held that s 579E(1)(b)(iv) required a past or present joint undertaking, not a future joint undertaking to enforce debts as found by the primary judge.⁶ Beach J also held that the chose in action alleged by Mr Morgan arose upon settlement of the contract on 1 July 2016, which was after both companies had been placed into insolvency administration. His Honour considered that the consequence of the companies being in insolvency administration was that any undertaking to enforce the alleged chose in action was in connection with legally separate liquidations rather than in connection with the joint undertaking of the printing business.⁷ In dissent, Markovic J would have dismissed MIH's appeal, concluding that the gateway in s 579E(1)(b)(iv) was satisfied and thus there was no need to consider Mr Morgan's notice of contention.⁸

25 By special leave to appeal, Mr Morgan appealed to this Court. Mr Morgan's grounds of appeal and submissions asserted: that the majority of the Full Court should have held that the gateway in s 579E(1)(b)(iv) was satisfied; that Beach J erred by treating Mr Morgan's alleged chose in action as only coming into

6 *McMillan Investment Holdings Pty Ltd v Morgan* (2023) 295 FCR 543 at 553 [70], 563 [146].

7 *McMillan Investment Holdings Pty Ltd v Morgan* (2023) 295 FCR 543 at 562 [136], [141]-[142].

8 *McMillan Investment Holdings Pty Ltd v Morgan* (2023) 295 FCR 543 at 582-583 [248], [250]-[251].

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existence at settlement of the contract on 1 July 2016, when it arose on 5 May 2016; and that s 601AH(5) of the *Corporations Act* deemed SAM to have been carrying on a joint business or undertaking with SAP of getting in their debts during the period that SAM was deregistered.

Pooling orders and the gateways in the *Corporations Act*

The history and purpose of pooling

26 In 1988, the Law Reform Commission ("the Commission") considered whether companies that have engaged in a common business enterprise might be "wound up together as if they were the one company". This would usually create one pool of property and one set of creditors.⁹ At a high level, the intended aim of pooling was to improve outcomes for unsecured creditors. Other perceived advantages of pooling were to minimise the costs of insolvency and contribute to market efficiency.¹⁰

27 The Commission proposed the introduction of legislation to provide that where there were two or more "related companies"¹¹ being wound up in insolvency, the court could, on application of a liquidator, make an order that the companies be wound up as if they were one company. The proposed legislation did not contain any gateway for the making of a pooling order apart from the requirement that the group companies be related, but included the condition that the court be satisfied that it was "just" to make the order.¹² The draft legislation proposed by the Commission identified some of the matters to be considered when deciding whether the order was "just". In addition to the extent to which creditors of any of the companies in liquidation may be advantaged or disadvantaged by a pooling order, the Commission identified four further matters to be considered, concerned with the past conduct of the related companies: (i) the extent to which any of the companies took part in the management of any of the other companies;

9 Australia, Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988), vol 1 at 343 [854].

10 Tran, "A framework for analysing the joint carrying out of 'a business, a scheme or an undertaking'" (2014) 22 *Insolvency Law Journal* 131 at 138.

11 See *Companies Act 1981* (Cth), s 7(5).

12 Australia, Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988), vol 2, Appendix A at 164-165.

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(ii) the conduct of any of the companies towards the creditors of any of the other companies; (iii) the extent to which the circumstances that gave rise to the winding up of one of the companies are attributable to the actions of any of the other companies; and (iv) the extent to which the business of the companies has been intermingled.¹³

28 In 2000, the Companies and Securities Advisory Committee ("CASAC") also recommended that courts be given the power to make pooling orders.¹⁴ CASAC's draft recommendation 23 was that "[t]he Corporations Law should permit the court to make pooling orders in the liquidation of two or more companies"; CASAC noted that this power "should be based on the current New Zealand provision".¹⁵ When the New Zealand scheme was introduced in 1958 it initially required only that the court be satisfied that a pooling order was "just and equitable".¹⁶ But the later New Zealand scheme considered by CASAC involved a gateway in addition to the "just and equitable" requirement, requiring that the companies to be pooled were related companies.¹⁷

29 In response to submissions on the draft recommendation, CASAC revised its recommendation and proposed that pooling orders should be based on the draft provision in the 1988 Law Reform Commission report.¹⁸ In 2004, the same Committee, then named the Corporations and Markets Advisory Committee ("CAMAC"), issued a further report. CAMAC recommended that the gateway requirement for pooling be one of: (i) a common ownership structure; (ii) a

13 Australia, Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988), vol 2, Appendix A at 164-165. See also vol 1 at 344 [855], [857].

14 Companies and Securities Advisory Committee, *Corporate Groups Final Report* (2000) at 145, 180.

15 Companies and Securities Advisory Committee, *Corporate Groups Final Report* (2000) at 179 [6.95].

16 *Companies Special Investigations Act 1958* (NZ), s 24.

17 See *Companies Act 1993* (NZ), ss 271, 272; Companies and Securities Advisory Committee, *Corporate Groups Final Report* (2000) at 166-169 [6.61]-[6.68].

18 Companies and Securities Advisory Committee, *Corporate Groups Final Report* (2000) at 179-180 [6.96]-[6.97].

common exposure to specific actual or contingent liabilities; or (iii) ownership or operation of corporate assets in a common scheme or undertaking.¹⁹

30 CAMAC provided the following reasons for this expansion of the gateway beyond related companies: "[t]he recommendation would permit pooling for holding/subsidiary companies or other related companies, as these companies have a common ownership structure. However, pooling should not be limited to these companies. The other criteria in the recommendation would, for instance, permit pooling of unrelated companies in a joint venture."²⁰

31 The *Corporations Act* pooling order provisions were introduced three years later, in 2007. Draft provisions included two statutory pooling mechanisms: a pooling determination that could be executed by external administrators that did not require the administrator to seek prior creditor approval, but which could be overturned by a single dissenting creditor, and a pooling order made by the court.²¹ The Explanatory Memorandum to the amending legislation²² stated that the reforms proposed in the amending legislation were based on the findings of both the 2000 and 2004 CASAC/CAMAC reports.²³ Unlike the draft provisions, in the final legislation statutory pooling was made available only for corporate groups in liquidation and pooling determinations required creditors' approval. The enacted provisions (unlike the draft provisions) also precluded a pooling order in several circumstances, including that the court is satisfied that the order would materially disadvantage an eligible unsecured creditor of a company in the group. The Explanatory Memorandum referred to the pooling determination provisions, which contain an identical gateway to the pooling order provisions, and explained that the gateway requirements would be that the companies "be related companies; or be jointly liable for one or more debts; or own or operate property that was used in

19 Corporations and Markets Advisory Committee, *Rehabilitating large and complex enterprises in financial difficulties* (2004) at 96.

20 Corporations and Markets Advisory Committee, *Rehabilitating large and complex enterprises in financial difficulties* (2004) at 97.

21 Harris, "The Revised Statutory Pooling Provisions" (2007) 19(3) *Australian Insolvency Journal* 28 at 28.

22 See *Corporations Amendment (Insolvency) Act 2007* (Cth), Sch 1, item 133.

23 Australia, House of Representatives, *Corporations Amendment (Insolvency) Bill 2007*, Explanatory Memorandum at 3 [2.2].

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connection with a business, scheme or undertaking carried on jointly by the companies".²⁴

The terms of s 579E

32 Section 579E of the *Corporations Act* is contained in Pt 5.6, Div 8 ("Pooling"). Subdivision A of Div 8, introduced in 2007, is concerned with pooling determinations, which may be made by a liquidator when approved by the eligible unsecured creditors of each of the companies in the pooled group.²⁵ Senior counsel for Mr Morgan said that the liquidator did not attempt to obtain that approval before this litigation. Subdivision B of Div 8 ("Pooling orders") is concerned with pooling orders made by the court. A pooling order is defined in s 9 as an order made under s 579E(1).

33 Section 579E(1) of the *Corporations Act* provides for the making of a pooling order as follows:

"Making of pooling order

- (1) If it appears to the Court that the following conditions are satisfied in relation to a group of 2 or more companies:
 - (a) each company in the group is being wound up;
 - (b) any of the following subparagraphs applies:
 - (i) each company in the group is a related body corporate of each other company in the group;
 - (ii) apart from this section, the companies in the group are jointly liable for one or more debts or claims;
 - (iii) the companies in the group jointly own or operate particular property that is or was used, or for use, in connection with a business, a scheme, or an

²⁴ Australia, House of Representatives, *Corporations Amendment (Insolvency) Bill 2007*, Explanatory Memorandum at 69 [4.248].

²⁵ *Corporations Act*, s 578.

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undertaking, carried on jointly by the companies in the group;

- (iv) one or more companies in the group own particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group;

the Court may, if the Court is satisfied that it is just and equitable to do so, by order, determine that the group is a pooled group for the purposes of this section."

The preliminary requirements of s 579E(1)

34 Two points arise from the opening words of s 579E(1). First, the use of the present tense ("[i]f it appears to the Court that the following conditions are satisfied") requires the court to be satisfied that a gateway requirement is met at the time of order. Secondly, the term "group" is not defined. As the Explanatory Memorandum explained, the term "group" was intended to have "its ordinary meaning as a collective noun",²⁶ which is "its ordinary meaning of a collection or plurality".²⁷ The companies comprising a group need not have any shared characteristics; it suffices that the applicant for a pooling order identify two or more companies in existence at the time of order.

35 Section 579E(1)(a) requires that the companies in the group are being wound up at the time of judgment. It is uncontroversial on this appeal that the effect of the primary judge's order on 2 December 2021 to reinstate SAM under s 601AH of the *Corporations Act* was that at the time the primary judge made the pooling order there were two companies (SAP and SAM) being wound up.

The operation of the gateways in s 579E(1)(b)

36 Although the gateways identify matters of possible relevance to the reasonable expectations of creditors dealing with the companies about who was

26 Australia, House of Representatives, *Corporations Amendment (Insolvency) Bill 2007*, Explanatory Memorandum at 69 [4.248].

27 *Allen v Feather Products Pty Ltd* (2008) 72 NSWLR 597 at 599 [9]. See also *Re Lombe* (2011) 87 ACSR 84 at 88 [8].

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responsible for their debts,²⁸ the legislative history described above does not shed light on the reasons for the choice of the particular individual gateway requirements beyond the obvious fact that the additional gateways were intended to expand the application of pooling orders beyond related companies. In the absence of a clear indication of purpose the preferable interpretation of the gateways must be one that pays close attention to the text.

37 As explained above, the gateways provided by s 579E(1)(b) were intended to expand the availability of a pooling order beyond related companies to limited further circumstances that might be comparable to those of related companies, in the interests of creditors. It is not enough merely that two or more companies had previously conducted a joint business, scheme or undertaking. At the level of generality described in the Explanatory Memorandum,²⁹ it is necessary also that the companies are jointly liable for one or more debts (s 579E(1)(b)(ii)) or own or operate property that was used in connection with a business, scheme or undertaking carried on jointly by the companies (s 579E(1)(b)(iii) and s 579E(1)(b)(iv)). In general terms, the connection must be between the use of the owned or operated property and the joint operation of the companies.

38 As to these latter two gateways, the first, s 579E(1)(b)(iii), requires that the particular property be jointly owned or operated. The second, s 579E(1)(b)(iv), is satisfied if only one company owns the particular property, but mere operation of the property is not sufficient. The two gateways can overlap where property in joint ownership is used as part of a joint undertaking. But the two gateways are distinct. For instance, s 579E(1)(b)(iii) will be satisfied where two companies jointly operate the same leased heavy machinery as part of a joint undertaking of selling goods. Section 579E(1)(b)(iv) will not be satisfied in those circumstances because neither company owns the property. On the other hand, if one of the companies owns the heavy machinery and uses it as part of a joint undertaking with the other company of selling goods then s 579E(1)(b)(iv) will be satisfied but s 579E(1)(b)(iii) will not.

The identification of "particular property" in ss 579E(1)(b)(iii) and 579E(1)(b)(iv)

39 The starting point for the application of s 579E(1)(b)(iii) or s 579E(1)(b)(iv) must be the identification by the applicant for a pooling order of the "particular

28 Tran, "A framework for analysing the joint carrying out of 'a business, a scheme or an undertaking'" (2014) 22 *Insolvency Law Journal* 131 at 142.

29 See [31] above.

property" which is relied upon to meet the gateway requirement. The use of the present tense for "own" and "operate" in s 579E(1)(b) requires that ownership or operation of the "particular property" by a company in the group be established at the time of judgment.³⁰

40 The expression "particular property" is not defined in the *Corporations Act*. In the context of the focus in ss 579E(1)(b)(iii) and 579E(1)(b)(iv) upon ownership or operation of any asset jointly or for joint benefit, the expression has properly been applied to both tangible and intangible property. It extends to all valuable rights and claims, whether real or personal. The definition of "property" in s 9 of the *Corporations Act* confirms that "property" includes a chose in action, which has been described as "a right enforceable by an action",³¹ and which at all stages in this litigation has been assumed to include an "alleged chose in action" involving genuine assertions of a right enforceable by an action.

41 The particular property upon which Mr Morgan relied at trial was identified only in closing oral submissions at trial. The particular property was described by the primary judge as a "chose in action to receive the proceeds of the \$330,000 that Print Warehouse paid MGS on 5 May 2016" said by Mr Morgan to be owned by SAP and SAM jointly or severally.³² In the Full Court, and in this Court, Mr Morgan asserted that the basis for that recovery was that the \$330,000 was money had and received.³³ In this Court, Mr Morgan properly accepted that SAP and SAM had no claim against Print Warehouse for the purchase price under the contract because that price had been paid. He described the claim as being that the "purchase price was improperly reduced". That is a claim for consequential loss based on unspecified, but apparently separate, causes of action held by SAP and SAM. It is not equivalent to recovery of \$330,000 based on a form of action for money had and received.³⁴ Mr Morgan did not suggest that SAP or SAM had any entitlement prior to 5 May 2016 to the money allegedly received by MGS from

30 *Re Australian Hotel Acquisition (in liq)* [2011] NSWSC 1374 at [43]; *Re Lombe* (2011) 87 ACSR 84 at 93-95 [44]-[47].

31 *Loxton v Moir* (1914) 18 CLR 360 at 379.

32 *Morgan v Sydney Allen Manufacturing Pty Ltd (in liq)* [2021] FCA 1669 at [90].

33 *McMillan Investment Holdings Pty Ltd v Morgan* (2023) 295 FCR 543 at 548 [35].

34 See Bullen and Leake, *Precedents of Pleadings in Personal Actions in the Superior Courts of Common Law*, 3rd ed (1868) at 44.

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Print Warehouse and did not point to any authority for any common law cause of action to recover the money paid to MGS. Accordingly, the prospect of an action for money had and received can be put aside.

42 In oral submissions, senior counsel for Mr Morgan focused upon causes of action for breach of statutory directors' duties and breach of fiduciary duties by the McMillans on the basis of his allegation that they were shadow directors of each of SAP and SAM at the time that the contract for sale was entered into with Print Warehouse. Mr Morgan's reliance upon these potential causes of action was noted by Yates J in the Full Court, who also referred to a related cause of action against MGS for knowing participation in any breach of fiduciary duty. In each case, Mr Morgan was correct in his submission in this Court that each of SAP and SAM's causes of action arose on 5 May 2016, at the commencement date of the contract for sale between Print Warehouse and SAP and SAM.

43 Mr Morgan's reliance in this litigation upon s 579E(1)(b)(iv), rather than s 579E(1)(b)(iii), properly reflected the lack of any joint ownership or operation of the separate alleged choses in action of SAP and SAM to recover \$330,000, whether on the basis of a claim for breach of statutory duties of directors, breach of fiduciary duty, or knowing assistance in a breach of fiduciary duty.

The use of the particular property in connection with a joint business

44 The appeal was conducted on the basis that SAP and SAM carried on the printing business that was sold to Print Warehouse jointly until the completion of the sale on 1 July 2016. As Beach J correctly said in the Full Court, the steps taken in the liquidation of SAP and (upon reinstatement) SAM were steps that were carried on separately through their liquidator or liquidators in relation to their separate liquidations. Mr Morgan thus focused upon how the proposed use by either of SAP or SAM of the alleged chose in action, by bringing proceedings to recover \$330,000, could be said to be use in connection with the printing business that the two companies carried on jointly.

45 As Barrett J said in *Re Lombe*,³⁵ "[t]he inquiry into use directs attention to both the present (whether the property 'is ... used, or for use') and the past (whether the property 'was used, or for use')". At the time of the primary judge's pooling order, SAP and (the reinstated) SAM had alleged choses in action against various

35 (2011) 87 ACSR 84 at 92 [40].

parties including MIH, Mr and Ms McMillan and MGS. But no steps had been taken to enforce those alleged choses in action.

46 Mr Morgan submitted in this Court that merely having an alleged chose in action that was "available to deploy" was sufficient for the property of one company to be "for use", so as to satisfy the requirements of s 579E(1)(b)(iv). Whether this is correct will depend in every case upon whether the identified use has a sufficient "connection" with the carrying on of the joint business, scheme or undertaking. As explained, there must be a connection between the identified use of the property and the joint operation of the companies. Were it otherwise, the words "that is or was used, or for use, by any or all of the companies in the group" would be superfluous. The necessary connection is not merely between particular property and the jointly carried on business, but between use of particular property by one or more of the group companies and the business jointly carried on by the group companies.

47 In some circumstances, it will be the case that the mere availability of an asset "for use" will have sufficient connection with the carrying on of a joint business, scheme or undertaking to satisfy s 579E(1)(b)(iii) or s 579E(1)(b)(iv). For instance, in *Council of the City of Newcastle v Royal Newcastle Hospital*,³⁶ a hospital was held to have "used" 291 acres of virgin land, within the meaning of s 132 of the *Local Government Act 1919* (NSW), through the "fresh air, peace and quiet, which are no mean advantages to it and its patients". Similarly, in the context of s 579E(1)(b)(iv), a chose in action constituted by a debt could be an item of property that is "used" even if it had not been enforced, for example where it was "turned to profitable account — in, say, a factoring or mercantile agency business, undertaking or scheme".³⁷

48 In other circumstances, the availability of the property "for use" will not have a sufficient connection with the carrying on of a joint business, scheme or undertaking because the availability of the property will be too remote from the operation of the joint business. For instance, a bank account that contains the surplus proceeds of the sale of a joint business may be "particular property" but the entitlement to those proceeds "for use" by the companies which sold the joint business does not have sufficient connection with the carrying on of that joint

36 (1959) 100 CLR 1 at 3-4; [1959] AC 248 at 255.

37 *Re Lombe* (2011) 87 ACSR 84 at 96 [58].

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business as required by s 579E(1)(b)(iv).³⁸ The receipt of the surplus is better characterised as connected with the disposal of the business rather than the carrying on of the joint business.³⁹ A liquidator that continues the trading of a company, or continues some of the activities of the company, will be carrying on the business.⁴⁰ But the act of selling the assets of the business outside of the usual process of trade, whether the assets are sold as a going concern or not, is not an act of carrying on the business.⁴¹ It is an act of disposing of the business.

49 The same is true of the alleged chose in action that arose on 5 May 2016 at the commencement of the contract for the sale of the business that had been jointly carried on by SAP and SAM. The mere availability of the alleged chose in action "for use" by SAP and SAM by commencing an action will not have sufficient connection with the "carrying on" of the joint business that was sold. The alleged chose in action will, instead, have a direct and substantial connection with the disposal of the business. For that reason, the alleged chose in action may be particular property of SAP or SAM but it is not for use, by SAP or SAM, in connection with the printing business that they conducted jointly prior to its sale to Print Warehouse.

Corporations Act, s 601AH(5)

50 Section 601AH(5) of the *Corporations Act* provides as follows:

"If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. A person who was a director of the company immediately before deregistration becomes a director again as

38 *Re Australian Hotel Acquisition (in liq)* [2011] NSWSC 1374 at [44]; *Re Lombe* (2011) 87 ACSR 84 at 92-95 [41]-[47]; *Re Watch Works Australia Pty Ltd (in liq)*; *Ex parte Francis* [2020] WASC 6 at [42].

39 See, for instance, *Corporations Act*, s 493.

40 See *Corporations Act*, s 477(1)(a). See also *Joshua Bros Pty Ltd v Federal Commissioner of Taxation* (1923) 31 CLR 490 at 495, 498, 499, 502; *Federal Commissioner of Taxation v Ashwick (Qld) No 127 Pty Ltd* (2011) 192 FCR 325 at 341 [33].

41 *Commissioner of Taxation (WA) v Newman* (1921) 29 CLR 484 at 489, 490; *Modern Permanent Building and Investment Society (in liq) v Federal Commissioner of Taxation* (1958) 98 CLR 187 at 192.

from the time when ASIC or the Court reinstates the company. Any property of the company that is still vested in the Commonwealth or ASIC reverts in the company. If the company held particular property subject to a security or other interest or claim, the company takes the property subject to that interest or claim."

51 Mr Morgan's third ground of appeal relied upon s 601AH(5) as having, in some unspecified way, the effect of deeming the gateway in s 579E(1)(b)(iv) to be satisfied. The substance of this ground of appeal was addressed briefly by Mr Morgan only in written submissions, where he asserted that s 601AH(5) "operated to deem SAM to have carried on a business, scheme or undertaking with SAP during the period of its deregistration".

52 Even if the statutory fiction contained in the first sentence of s 601AH(5) could have the effect that Mr Morgan suggested, it is unclear how that could provide a connection between the alleged chose in action held by SAP and SAM at the time of the sale agreement and the printing business that the companies conducted prior to its sale to Print Warehouse. In any event, Mr Morgan's submission misunderstands the effect of s 601AH(5). The first sentence of s 601AH(5) has only a limited effect as a retrospective fiction, deeming a company to have continued to exist. It has no effect on the fact that no business, scheme or undertaking took place during that period of deemed existence.

53 On 2 December 2021, when the primary judge ordered the reinstatement of SAM, the first sentence of s 601AH(5) had the effect that SAM was deemed to have continued in existence as if it had not been deregistered by ASIC from 10 June 2018. At the time of deregistration, SAM was in a creditors' voluntary winding up. The effect, therefore, was that SAM must be taken to have continued in a creditors' voluntary winding up for that period of more than three years until 2 December 2021. The first sentence of s 601AH(5) had no greater retrospective effect than that. As the second sentence confirms, the first sentence of s 601AH(5) did not deem persons to be directors of SAM during the period in which SAM was deregistered. As the third and fourth sentences confirm in addressing the reversion of property and its terms, the first sentence of s 601AH(5) also did not deem SAM to have held any property during that period.

Conclusion

54 There was no dispute on this appeal that in the conduct of their joint business, SAP and SAM did not incur any joint liability for a debt and did not have any joint ownership or operation of property. The mere availability to SAP and SAM of an alleged chose in action, arising from the disposal of the business of the

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companies, and which might be enforced in the future, does not have the required connection with the previously existing business that they carried on jointly to satisfy the gateway requirement in s 579E(1)(b)(iv).

55 The appeal should be dismissed with costs.

