



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B19/2022

BETWEEN: **METAL MANUFACTURERS PTY LTD**
(ACN 003 762 641)
Appellant

and

10 **GAVIN MORTON as liquidator of MJ WOODMAN ELECTRICAL**
CONTRACTORS PTY LTD
(IN LIQUIDATION) (ACN 602 067 863)
First Respondent

MJ WOODMAN ELECTRICAL
CONTRACTORS PTY LTD (IN LIQUIDATION) (ACN 602 067 863)
Second Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

Part I: Certification

20 1. These submissions are in a form suitable for publication on the internet.

Part II: Outline of Oral Argument

2. **Issues on the appeal:** Is set off under s 553C *Corporations Act 2001* (Cth) available in the face of a claim for recovery of an unfair preference under s 588FF(1)(a)?

3. More generally, following the 1992 Harmer reforms, what coherent interpretation is to be given to: (a) the role of the liquidator over the company's property (*Linter Textiles*); (b) the *pari passu* principle (ss 555, 556); (c) recovery provisions for antecedent and post liquidation transactions (s 468 and Part 5.7B); and (d) set off (s 553C, cf s 553A)?

4. **Overall submission:** Set off under s 553C (circularity apart) is available in the face of

30 a claim by the liquidator for recovery of monies to the company in response any of the above antecedent or post liquidation transactions, subject only to s 553C(2).

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5. **Principles established by this Court on mutuality:** The breadth of ‘...*other mutual dealings*’ ensures that the scope of the set off is not frustrated by a narrow or technical approach to ‘*credits*’ or ‘*debts*’: **AS [8]; [18]; *Hiley***.
6. The term ‘*dealings*’ is used in a non-technical sense. It covers communings and negotiations (verbal and by correspondence), and other relations which occur in commerce, including payments and receipts of money: **AS [55]; *Gye v McIntyre* at 625**.
7. There must exist at the relevant date ‘*dealings*’ which ‘*involve*’ rights and obligations between the company and the creditor, and which are capable of giving rise to, and subsequently do give rise to, ‘*mutual*’ claims between them: **AS [28]-[29]; *Hiley* at 497**.
- 10 8. ‘*Mutuality*’ is directed to the relationship between the claims which arise from the dealings, not to the dealings themselves. It conveys reciprocity rather than identity or sameness. It involves three aspects: (i) the credits, debts or claims arising from other dealings be between the same persons; (ii) the benefit or burden of them lie in the same interests, having regard to the equitable or beneficial interest of the parties; and (iii) the credits, debts or claims arising from other dealings must be commensurable, meaning that they ultimately sound in money: *Gye v McIntyre* at 619; **AS [21]**
9. While the rights or obligations must exist at the commencement of the winding up, it is no bar to the set off that the liquidator, as the agent of company, exercises powers to convert them from contingent to actual money form: *Hiley; Day & Dent*: **AS [17]-[21]**
- 20 10. **Ground One: Mutuality not denied on the ground of beneficial entitlement:** Mutuality is not defeated by the fact that the liquidator will hold the proceeds of the preference claim to be distributed under the statutory order of priorities. No trust is created: *Linter* at 634 (**AS [25]**). The monies will join the same pool of funds as all other monies under the liquidator’s control, under the same rules: **AS [22]-[26]; AR [3]-[10]**.
11. **Ground Two: Mutuality not denied on the ground of lack of a contingent right or obligation at the date of winding up:** Mutuality is not defeated by the fact that a winding up must ensue and the liquidator must choose to claim under s 588FF. This does not create a ‘new transaction’; it is merely the working out of the rights and claims in existence at the date of liquidation: **AS [27]-[30]; AR [11]-[12]**.
- 30 12. Set off has correctly been held available in a range of recovery actions on the ground of contingency: (a) as to s 468(1): *Shirlaw*; (b) as to s 558M and 558W: *Re Parker*; and (c) as to s 588FE: *Buzzle* (uncommercial transaction), *Hall v Poolman* and *Melrose Cranes* (unfair preference). The Full Court’s partial attempts to distinguish *Shirlaw*, *Re Parker* and *Buzzle* from unfair preference claims are unpersuasive: **AS [31]-[38]**.

13. **Ground Three: The Full Court misunderstood the role of s 553C(2):** Section 553C(2) requires the creditor to have had no notice (that is, actual knowledge) of the insolvency of the company at the time of each dealing relied upon in the account. Section 553C(2) protects the integrity of the account for the pre-liquidation period. It defines the correct point of intersection between s 553C and the unfair preference (and the other recovery) provisions. The Full Court wrongly marginalised the actual text of s 553C(2), and its difference from the form recommended by Harmer: **AS [39]-[42]**.
14. The Full Court's "no change" assumption was also infected by a misunderstanding of the century of history leading up to Harmer. Apart from some of the cases being in bankruptcy not liquidation, and the differing statutory regimes, the Full Court has failed to recognise the distinction between impermissible set-off in the case of circularity and permissible set-off in the case of separate debts that emerges in the cases: **AS [43]-[52]**.
15. **Conclusion: Set off is available in the present case:** The company and the creditor engaged in *dealings* prior to the winding up, being the supply of goods to the company, the incurring of debts for those supplies, and payment of some but not all of those debts. Any discharge of a debt at general law was always subject to the contingency: if at the date of the winding up the conditions existed for it to be a voidable transaction (ss 588FA, 588FC and 588FE), the creditor would be required to reverse the payment such that the underlying debt would revive (ss 588FF and 588FI).
16. At the date of the liquidation, the dealings were capable of giving rise to, and subsequently did give rise to, claims which were *mutual* (same persons, same beneficial interests, commensurable), requiring an account to be taken of what is *due* from one party to the other in respect to those mutual dealings.
17. Under the account:
- (a) if the unfair preference claim fails, \$194,727.23 is due from the company to the creditor and admissible to proof;
 - (b) conversely, if the preference claim is made good, the sum of \$190,00 due from the creditor to the company under s 588FF(1)(a) is set off against the sum due by the company to the creditor, such that only \$4,727.23 is admissible to proof. In this latter event, s 588FI is never reached: **AS [8]-[10]; [53]-[58]**.

Dated: 12 October 2022



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