HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A10/2022

BETWEEN

DANIEL MATHEW BRYANT, IAN MENZIES CARSON, AND CRAIG DAVID CROSBIE IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF GUNNS LIMITED (IN LIQUIDATION) (RECEIVERS & MANAGERS APPOINTED) (ACN 009 478 148) AND AUSPINE LIMITED (IN LIQUIDATION) RECEIVERS & MANAGERS APPOINTED) (ACN 004 289 730)
Appellants

and

BADENOCH INTEGRATED LOGGING PTY LTD (ACN 097 956 995)
Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

PART I: Certification

This outline is in a form suitable for publication on the internet.

PART II: Outline of Propositions

Ground 1 – the peak indebtedness rule

1. In enacting s 588FA Parliament did not intend to: effect a substantive change in the law of unfair preferences: *V R Dye*, 210 [27], 212 [33]-[34]; *McKern*, 9-10 [25]-[26], 40-41, [117]-[118]; *Beveridge*, [30]; *Kassem*, 163 [50] {AS[18]-[22], [30]-[32]}; or to abrogate the peak indebtedness rule: *Olifent*, 292; *Sutherland v Lofthouse*, 664 [34]; 669 [50]; {AS[32]}. To the contrary, the intention of Parliament was to embody in s 588FA(3) the principles in *Queensland Bacon* at 286, 282 per Barwick CJ: EM [1042]; {AS[11], [18]-[22]}.

2. The "transaction" to which s 588FA(3)(a) refers is the first impugned payment that a liquidator elects (under s 588FF(1)) to apply to avoid: *In re Gunsbourg*, 454-456: *NA Kratzmann*, 277; *Rees*, 221: {AS[6]-[7]}.

3. Where that payment is an integral part of a *continuing* business relationship or running account, the effect of *that* payment, which is determinative of the fact and extent of any preference {AS[8]-[9]}, is to be determined (under s 588FA(3)(c)) by reference to the net (or ultimate) effect of the operations *from the date of that payment* to the date of liquidation or terminal date (i.e. "*all transactions forming part of the relationship as if they together constituted a single transaction*": s 588FA(3)(c)): {AS[11]-[13]}.

4. A liquidator may elect to impugn only those payments made after the point of 'peak indebtedness' in a running account, being the point after which the net value of payments

received exceeds the value of further supplies made: *Rees*, 221. This election, together with the 'ultimate effect' or 'running account' principle, now embodied in s 588FA(3)(c), give rise to the 'peak indebtedness rule': *Rees*, 221; {AS[14]-[17]}.

5. This construction of s 588FA(3) {AS[26]} is: open on the words of s 588FA and s 588FF; is consistent with: (a) with the common (judge made) law s 588FA(3) was intended to embody {AS[11], [21]-[22]}; (b) the purpose of s 588FA: *Airservices*, 509; {AS[12]}; (c) the purpose of Part 5.7B: *Fortress*, 500, 505; and (d) the fundamental precept of corporate insolvency law that assets are to be shared rateably amongst creditors: *Airservices*, 516; {AS[13], [27]}

6. In contrast, the literal construction of s 588FA(3)(c){FC2[21]-[22], AS[24]}, while open on the words of s 588FA(3), would be a fundamental change to the common law that s 588FA was intended to embody as: it would abolish a liquidator's right of election {AS[6]-[7]} and replace the well-established principles for determining the fact and extent of any preference {AS[8]-[13]} with an assessment of the 'net effect of all transactions between the parties over their entire business relationship'. This would invariably lead to the creation of a preferred class of creditors exempt from the unfair preference regime altogether: *Olifent* 292 contrary to the object of s 588FA and Part 5.7B; and the precept that assets are to be shared rateably amongst creditors. The Full Court acknowledged this result was absurd: {FC[84]}

7. The construction below {FC[117]} and in *Timberworld*, [68]-[69],{AS[34]} that "all the transactions forming part of the relationship" means all transactions in "the statutory period" (s 588FE(2)(b)): {RS[5]} is <u>not</u> open on the words of s 588FA(3) and would be a fundamental change to the law of preferences as: it would abolish a liquidator's right of election {AS[6]-[7]} and replace the established principles for determining the fact and extent of any preference {AS[8]-[13]} with an assessment of the 'net effect of all transactions in an arbitrary {[FC121]} six month period: {FC[121]}. This would result in a class of preferred creditors who are permitted to offset against payments of past indebtedness the value of previous supplies made in the statutory period, in preference to other creditors, contrary to the object of s 588FA, Part 5.7B; and the precept that assets are to be shared rateably amongst creditors.

8. This construction also reads into s 588FA(3)(c) - without justification - one of three applicable statutory periods (s 588FE (2(b),4(c),5(c)); can result (as here) in the 'single transaction' incorporating transactions that were entered into at a time the company was not insolvent {AS[28] cf. s 588FC} and, if the applicable statutory period is applied, would favour fraudulent and related party recipients of unfair preferences to arm's length ones {AS[29]}.

9. The final construction:{RS[5]}, that "all the transactions forming part of the relationship" means all transactions in the period beginning either six-months prior to the relation-back day: s 588FE(2)(b)(i) or such later date as the company is found to be insolvent and ending on the date of liquidation is likewise not open on the words of s 588FA(3) and suffers from the same defects as above save that it does not incorporate transactions prior to the date of insolvency.

Ground 2 – termination of the continuing business relationship

10. The requirement to consider the ultimate effect of an impugned payment only arises if it is "clear" that the payment was based on a mutual assumption of continued supply and payment on ordinary terms: *Queensland Bacon*, 281, 285-286; *Airservices*, 505, 507, 509; *M&R Jones*, 290; *Olifent*, 289; *Eurolinx*, 504.

11. Events may sever this connection: *Queensland Bacon*, 282 including where a payment is made looking to the partial payment of an old debt rather than to the provision of continuing services: *Airservices*, 510 or where the operative, mutual purpose of inducing further supply is subordinated to the predominant purpose of recovering past indebtedness: *Eurolinx*, 504-505.

12. Davies J was right to find that when payments 1 and 2 were made Badenoch was looking to the repayment of past indebtedness {J[99]; FC[72]}. It had suspended supply, questioned Gunns' solvency, and acted with the stated purpose of protecting its exposure: {AS[83]} The Full Court was wrong to doubt *Eurolinx* {FC[54]}, to apply a 'sole purpose' test: {FC[53]-[57]; AS[87]} and to conflate Gunns' purpose, of getting deliveries back on track to keep a mill running, with Badenoch's purpose of protecting its exposure: {FC[65]; AS[90]}.

Cross Appeal

13. There is no point of principle arising from the cross appeal nor is the decision of Davies J {J[99(c)]} or the Full Court {FC[79]} that the continuing business relationship had ceased by payment 5 attended with sufficient doubt to warrant special leave. By that time, Badenoch had stopped supply, terminated its contract, required the repayment of its debts in full in return for minimal further supplies, for the stated purpose of getting its past debts repaid: {AS2[19]}.

18 October 2022

Bret Walker