HIGH COURT OF AUSTRALIA

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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' REPLY

PART I: Certification

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

PART II: Reply Argument

2. **Peak Indebtedness –** Contrary to the Respondent's submissions RS[5],[17] the peak indebtedness rule does not involve the liquidator choosing or electing "the starting point of the continuing business relationship" in s588FA(3). It involves the liquidator electing which voidable transactions to apply (under s588FF) to avoid as an unfair preference.

3. Where there exists a business relationship or running account, "continuing" at the time of the first impugned payment, the inference (codified in s588FA(3)(c)) is that the impugned payment is so closely connected in purpose with the *continuing* provision of supplies in the account as to make it impossible to determine whether the impugned payment resulted in an unfair preference without considering the (ultimate) effect of both the impugned payment(s) and the transactions that *followed*: *Richardson*, 133.

4. To use the language of s588FA, "where a transaction [being the transaction a liquidator has applied to avoid under s588FF] is, for commercial purposes, an integral part of a *continuing* business relationship [that is, a relationship *continuing* at and from the time of the impugned transaction]… then [the test for an unfair preference in s588FA(1)] applies in relation to all the transactions forming part of *the relationship* as if they constituted a single transaction; and the transaction [sought to be impugned]… may only be taken to be an unfair preference… if… the single transaction… is taken to be such an unfair preference". In context, the reference to "all transactions forming part of *the relationship*" refers to all transactions forming part of the

business relationship or running account *continuing* at and from the date of the first impugned transaction(s). The submission RS[5],[17] that the peak indebtedness rule is inconsistent with the words "all transactions forming part of the relationship" ignores this construction.

5. The Respondent's alternative construction RS[5],[20] to the effect that "all transactions forming part of the relationship" refers to all transactions during the period beginning on *the later of* the date six months prior to the relation-back day (s588FE(2)) and the date of insolvency, and ending on the relation-back day: is not open on the words of s588FA(3); ignores that there is no single relation-back period for unfair preferences (ss588FE(2),(4),(5); cf. RS[19]); is contrary to the common law s588FA was intended to embody (AS[20]); is contrary to the object of Part 5.7B; and would lead to the perverse results referred to in AS[29].

6. The contention at RS[18(b)] that the peak indebtedness rule cannot be reconciled with the doctrine of 'ultimate effect' is incorrect. As submitted in AS[14], the rule is merely the application of that doctrine, following an election by a liquidator to impugn only those payments made after the point of peak indebtedness. Neither *Richardson* nor *Airservices* sought to assess the effect of a continuing business relationship (either in whole or in part), as distinct from the effect of an impugned payment, nor did they purport to assess the effect of an impugned payment by reference to *prior* dealings between the parties.

7. Properly construed, the effect of s588FA(3) is to give an unsecured creditor who supplies goods or services on (running) account the benefit of an assumption that, so long as that business relationship is continuing on usual or ordinary terms, the purpose of each impugned payment was to procure further supplies, such that the 'ultimate effect' of the impugned payment must be assessed having regard to the value of those *subsequent* supplies.

8. The law of unfair preferences is and has always been concerned with adjudging whether a voidable transaction (impugned payment) has the effect that one creditor receives an unfair preference over other creditors. It has never been directed at assessing whether a "business relationship", or "running account", either in whole or in part, is detrimental to creditors, as the literal construction of s588FA(3) and the Respondent's construction would do.

9. Where the object of s588FA is to achieve parity between unsecured creditors, each of whom has, by definition, supplied goods or services of greater value than payments received over the course of that business *relationship*, a construction that would assess the effect of some unsecured creditors' "payments" (s588FA(1)), while assessing the effect of other unsecured creditors' "relationships" or "running accounts" (in whole or in part), thereby

permitting some creditors, but not others, to recover past indebtedness, as the Respondent's construction of s588FA(3)(c) would do, is antithetical to that purpose.

10. The Respondent concedes (RS[11],[12]) that its construction, which allows creditors who supply goods or services on account to have the benefit of *earlier* dealings in the business relationship when determining if there has been an unfair preference, provides a carve out (in full or in part) from liability under the unfair preferences regime. This would create a preferred class of creditors immune (in whole or part) from the unfair preference regime, contrary to the purpose and object of Part 5.7B, which is to facilitate equality of distribution amongst all unsecured creditors: *G&M Aldridge Pty Ltd v Walsh* (2001) 203 CLR 662, 675 [29]-[30].

11. By contrast, the Appellants' construction, whereby a liquidator may elect under s588FF to apply to avoid those payments made after the point of peak indebtedness in a running account, with the effect of those payments being determined (by operation of s588FA(3) properly construed) by reference to the ultimate effect of those payments together with any *subsequent* supplies procured by those payments (the peak indebtedness rule), permits all unsecured creditors to retain payments only to the extent that they procure *further* supplies of value, with all other payments being recoverable to be shared rateably amongst all creditors.

12. The effect in RS[12], of deterring a race to the courthouse and enhancing the prospect of debtors trading out of difficulty, is not the object of s588FA(3) but is a "consequential effect" of a preference regime (s588FA) that aims to secure equality of distribution amongst creditors: *G&M Aldridge*, 675. The literal construction of s588FA(3)(c) and the Respondent's proposed construction are contrary to that object: AS[13]. Only the Appellant's construction, which allows all creditors to retain payments only to the extent they have secured *further* goods or services of greater value than the sum of those subsequent payments, serves this purpose.

13. The submission (RS[14]) that the reference to "impugned payment" in *Queensland Bacon* may be ignored, as Barwick CJ was applying a different statute and s588FA(3)(a) does not contain the word "impugned" before the word "transaction", ignores that the purpose of s588FA is to determine whether a transaction sought to be 'impugned' under s588FF is to be adjudged an unfair preference. The *Bankruptcy Act 1924*, s95 (in issue in *Queensland Bacon*) likewise did not contain the word "impugned" in terms.

14. **Continuing business relationship –** The purpose of s588FA(3)(c) is <u>not</u> to prevent unfairness to a creditor who has supplied goods or services of value to a company in the period preceding winding up (cf. RS[24]). Unfairness, in the sense of not being paid in full for supplies

made, is common to all unsecured creditors to whom s588FA applies: *Airservices*, 522-523 (Toohey J). The purpose is merely to prevent the unfairness that would arise if an impugned payment was made *for the purpose of* inducing further supplies but the effect of that payment was determined without regard to the value of the further supplies actually made by the creditor.

15. The necessary causal connection between an impugned payment and further supplies is not established by "prior commercial practice between the parties" alone (cf. RS[23]). The term "continuing business relationship" in s588FA(3)(c) contemplates a course of trading between the company and creditor over time, on the footing that goods or services would be supplied on credit and on ordinary terms, as agreed, bringing with it a reasonable expectation that so long as payment is made as agreed, the supplier will continue to supply on the agreed terms: *Queensland Bacon*, 281. The critical feature is a "continuance of supply" (*Queensland Bacon*, 285) on credit terms ordinarily applicable to the creditor's business: *Airservices*, 505.

16. While the existence of a running account will *usually* support the conclusion that the parties dealt on the basis of a mutual assumption of payment and reciprocal supply on usual terms, requiring the 'ultimate effect' of the payments to be considered, that conclusion will not always be open on the facts: *Airservices*, 505, 509. An example is where, as here, the mutual assumption of payment and reciprocal supply on ordinary terms had ceased and the mutually operative purpose of inducing the further supply on ordinary terms had been subordinated to the predominant purpose on the part of the creditor of recovering past indebtedness: *Eurolinx*, 505, such that payments are made 'looking backward rather than forwards to the payment of old debts rather than the provision of *continuing* services': *Airservices*, 510.

17. In this case, payments 1 and 2 were made in isolation from, and as a precondition to restoring, the relationship of purchaser and supplier, which relationship had been suspended by Badenoch until after these payments were made: J[46]. The relationship was then to be restored on different terms. The payments were <u>not</u> made on the footing of a *continuance* of supply on ordinary terms. At the time these payments were agreed, Badenoch was "looking backwards" to the repayment of past indebtedness and to "protecting its exposure". The submission RS[28] that the Court must look to the 'ultimate effect' of a transaction to determine its purpose is also misconceived. Only if the purpose of a transaction is to induce further supply does the 'ultimate effect' of that transaction arise for consideration.

18. **Cross Appeal –** Contrary to RS[29], [38] the Full Court rejected the test in *Eurolinx*, finding instead that a continuing business relationship would end where the 'sole' or 'real'

purpose of a payment was the recovery of past indebtedness "rather than" the continuing supply of goods or services: FC[55]-[57]. Despite having applied that sole purpose test, where Davies J had applied the test in *Eurolinx*: J[99(c)], the Full Court nevertheless upheld Davies J's finding that the continuing business relationship had ceased prior to payment 5: FC1[79]. As this finding was open, regardless of the test applied, the cross appeal raises no question of principle, only a question of fact (RS[34],[35],[38],[41]) that does not warrant special leave.

19. The evidence does not support the submission RS[34],[35] that a "continuing business relationship" subsisted until administrators were appointed. To the contrary, when payment 5 was made, Badenoch had: imposed a credit limit after which supply would cease: J[47],[49]; demanded payment; threatened legal proceedings; threatened to cease supply and to terminate the contract: J[63]; ceased supplying services: J[64]; FC1[60]; said any cessation would be permanent: J[56]; sought security: J[47],[68]; threatened to issue a statutory demand: J[69],[75]; and the parties had agreed (J[79],[84], FC2[8]) to terminate the contract on terms that included Auspine repaying its outstanding debt in full (payments 5-11) and Badenoch providing limited services, in the short term, tapering off while another contractor took over: J[77], FC1[78]. It was conceded that, at the time, Mr Badenoch knew Gunns' financial position was poor: J[66]; he had told others Badenoch had "*finished up with Gunns*": J[73]-[74]; and that supplying limited services was "*absolutely*" about getting Badenoch's debt paid down: J[89]; FC1[78]. In that context, Auspine repaid more than $1.2 million of past indebtedness and Badenoch supplied limited services of only $210,000: J[15]. There can be no doubt that when payments 5 to 11 were agreed and made, the parties were not conducting their dealings on the basis of a mutual expectation of continued supply on ordinary terms*: Airservices*, 507; *Queensland Bacon*, 286. Instead, Badenoch was "looking backwards rather than forwards to the payment of old debts rather than the provision of *continuing* services": *Airservices*, 510.

20. In the premises, the cross-appeal raises no question of principle warranting consideration by this Court and there is no reason to doubt the correctness of the conclusion of Davies J and the Full Court. Special leave should be refused.

24 June 2022

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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

ANNEXURE TO THE APPELLANTS' REPLY SUBMISSIONS

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Appellants set out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Title	Provision(s)	Version
		Statutory Provisions	
1.	*Bankruptcy Act 1924* (Cth)	s 95	Act no longer in force (8 October 1924 – 1965)
2.	*Corporations Act 2001* (Cth)	ss 588FA, 588FE, 588FF, and Part 5.7B	Historical version (30 January 2012 to 19 April 2012, 20 April 2012 to 27 June 2012, 25 July to 30 September 2012)