HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 03 Jun 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	A10/2022
File Title:	Bryant & Ors v. Badenoch Integrated Logging Pty Ltd
Registry:	Adelaide
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	03 Jun 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

Form 27D – Respondent's submissions

(rule 44.03.3)

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY No. A10 of 2022

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA (FULL COURT)

BETWEEN:

BRYANT & ORS AS LIQUIDATORS OF GUNNS LTD and AUSPINE LTD

Appellants

and

BADENOCH INTEGRATED LOGGING PTY LTD (ACN 097 956 995)

Respondent

RESPONDENT'S SUBMISSIONS

Part I: suitability for publication on internet:

1. The respondent certifies that these submissions are in a form suitable for publication on the internet.

Part II: issues presented by appeal and cross appeal:

2. The issues which the respondent contends the appeal (including its application for leave to cross appeal) presents are as follows:

   (a) whether the 'peak indebtedness' doctrine[1] now has any operation in Australia in light of the express reference in s 588FA(3)(c) of the Corporations Act 2001 to "all the transactions forming part of the relationship" (emphasis added);

   (b) whether a continuing business relationship can subsist within the meaning of section 588FA(3) of the *Corporations Act* 2001 ("the Act") in circumstances where the parties have determined that the relationship will continue but terminate at a future time; and

[1] As formulated by Barwick CJ in *Rees v Bank of NSW* (1964) 111 CLR 210, at 220-221.

(c) whether the predominant purpose of a supplier continuing to supply goods and services to a company in order to obtain payments in reduction of the company's indebtedness to the supplier notwithstanding that both parties intend that supply will continue is inconsistent with there being a 'continuing business relationship' between the supplier and the company for the purposes of section 588FA(3) of the Act.

Part III: Notice pursuant to s 78 B of *Judiciary Act* 1903 (Cth):

3. The respondent considers no such notice need be given.

Part IV: Material facts stated by appellants contested:

4. Not applicable.

Part V: respondent's argument in answer to appellants:

Peak indebtedness

5. Paragraph 588FA(3)(c) of the Act says that if there is a continuing business relationship as defined in s 588FA(3)(a) and (b), subsection 588FA(1) applies 'in relation to **all** the transactions forming part of the relationship as if they together constituted a single transaction' (emphasis added). The use of the word 'all' is inconsistent with the liquidator being able to choose the starting point of the continuing business relationship, such that s 588FA(3) only applies to some of the relevant transactions. Due to s 588FE(2), in this context the relevant 'relationship' is that during the six-month period ending on the relation back day, or after that day but before the commencement of winding up where the company is found to be insolvent on a date later than the first day of the relation back period (as is the case in the present circumstances), during which such transactions can be set aside under ss 588FA, 588FE and 588FF.[2] The use of the word 'all' in s 588FA(3)(c) means that the 'single transaction' must include 'all the transactions forming part of the relationship' within this period.

[2] *Badenoch Integrated Logging v Bryant and Ors* [2021] FCAFC 64 ("FC"), at [84]-[87]. 'It is common ground that the single transaction must begin within the relation back period, which is six months in the present case': FC, at [87]; see also FC 2, at [20].

6. The Full Court's conclusion that a liquidator does not have a right to choose any starting point during the statutory six month period[3] to show there is a preferential payment is thus mandated by 'the plain language of s 588FA(3)';[4] that is, on its face, the provision does not allow the operation of the peak indebtedness rule.[5]

7. The FC decision is the only appellate decision since the enactment of s 588FA that has considered the meaning of the provision in any detail,[6] apart from the decision of the High Court of New Zealand in *Timberworld*,[7] which considered the application of a substantially similar provision. The Full Court agreed with the reasoning in *Timberworld*, which also considered the Australian authorities on peak indebtedness.[8]

8. The enactment of s 588FA codified the law relating to unfair preferences.[9] Whether the peak indebtedness rule applies in the context of the Act therefore does not turn on whether Barwick CJ's statement in *Rees* was obiter dictum or ratio decidendi (which in any case concerned different statutory provisions)[10]; but, rather, the interpretation and application of the Act[11] and, specifically, s 588FA.

9. In undertaking the task of statutory interpretation, the starting point for the analysis is the text of the provision. The objective of statutory construction is to give effect to the purpose of the provision as expressed in the text.[12] Words of the provision should not be considered in isolation; if the provision to be construed is not read subject to another section or sections, the latter 'would have very little work to do'.[13] In doing so, the apparent scope of the relevant section may be so limited as compared with a construction of it if it stood in isolation.[14]

---

3 Prescribed by s 588FE (2)(b)(i) of the Act.
4 FC, at [83].
5 The rule is derived from the reasons of Barwick CJ in *Rees v Bank of New South Wales* (1964) 111 CLR, 210, at 221 in the context of considering the application of s 275 of the *Companies Act 1931* (Qld) and s 95 of the *Bankruptcy Act 1924*.
6 FC, at [90]-[100].
7 *Timberworld Ltd v Levin* [2015] 3 NZLR 365 ("*Timberworld"*).
8 FC, [82]-[83].
9 *Re EMPLOY (No 96) Pty Ltd* (2013) 93 ACSR 48, at 61 [43] (per Black J)
10 FC, at [95].
11 FC, at [94].
12 See, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, at 381 [69] (per McHugh, Gummow, Kirby and Hayne JJ).
13 *Lee v Minister for Immigration and Citizenship* (2007) 159 FCR 181; 241 ALR 363, at [39].
14 See, eg, *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, at 479.

10. Master Burley was the first judicial officer to consider whether the peak indebtedness rule applied under s 588FA,[15] finding that the rule did apply although he noted that the legislation was 'silent' as to whether it applied.[16] In *V R Dye & Co v Peninsula Hotels Pty Ltd*[17] Ormiston JA said s 588FA 'should be construed in the same way as the former provision, except to the extent that the language of s 588FA clearly points to a contrary conclusion'.[18] As the Full Court found, the language of s 588FA(3) clearly points to a 'contrary conclusion' in respect of the application of the 'peak indebtedness' rule and *Olifent*, and the cases that followed it were wrongly decided.[19]

11. Sections 588FA(3)(c) and (d) of the Act state that, if the conditions in ss 588FA(3)(a) and (b) are met 'all the transactions' in the series of transactions must be assessed as if they were one transaction. There is no policy rationale for applying the 'peak indebtedness' rule to this provision. The Full Court was correct in finding that 'it was Parliament's intention to allow creditors to have the benefit of earlier dealings within a continuing business relationship when determining whether there has been an unfair preference.'[20]

12. That purpose is evident in the words of s 588FA(3), which, in effect, provide a carve out (in full or part) from liability under the unfair preferences regime for creditors that continue to supply goods and services to a debtor as part of a continuing business relationship, including a running account. There is a complete defence where the value of what is provided exceeds the amount of the preferences, and a partial defence where the value of the goods or services provided do not exceed the amount of the payments received. The purpose of the provision has the

---

15 *Olifent v Australian Wine Industries Pty Ltd* (1996) 19 ACSR 285, at 291-292 ("*Olifent"*). Master Burley noted that the peak indebtedness rule had been applied by Santow J in *Rothmans Exports Pty Ltd v Mistmorn Pty Ltd* (1994) 15 ACSR 139. It is noted that Santow J assumed the rule applied without considering the wording of the statute: at 150.

16 Ibid, at 292.

17 [1999] 3 VR 201; (1999) 150 FLR 307; [1999] VSCA 60 (CA).

18 *VR Dye v Peninsula Hotels Pty Ltd* [1999] 3 VR 201; (1999) 150 FLR 307; [1999] VSCA 60, at [33] (per Ormiston JA) (emphasis added). Cf *Potter v Minahan* (1908) 7 CLR 277, at 281 'there is a presumption that no alternation of the law is intended which is beyond the scope and object of the Act', and at 304: 'one of these presumptions is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares…either in express terms or by implication; or, in other words, beyond the immediate scope and object of the Statute'.

19 FC, at [110]-[111].

20 FC, at [104].

consequential effect of deterring the 'race to the courthouse'[21] which in turn enhances the prospect of enabling debtors to trade out of their difficulties by being able to continue to receive the goods and services needed to trade without undue and discriminatory risk to creditors.[22] The interpretation of s 588FA upheld by the FC decision best achieves the purpose or object of the Act[23] and is to be preferred to the construction proposed by the Appellants, which does violence to the words, meaning and purpose of s 588FA(3).

13. The Full Court correctly considered that the two cases referred to in the Explanatory Memorandum, *Petagna*[24] and *Queensland Bacon*,[25] along with the clear words of the provision, did not provide any support for the continued application of the peak indebtedness rule. That is, 'Parliament's intention' was that the peak indebtedness rule had no place in the statutory unfair preference regime under s 588FA(3)[26] and that is clear on the face of the text.

14. In respect of *Queensland Bacon*, the FC decision noted that 'there was no other express reference to the potential application of the peak indebtedness rule'[27] apart from Barwick CJ's expanded statements explaining the question in dispute.[28] Moreover, his Honour was applying a different statute to the case before him and the law relating to preferences had not yet been codified; so to the extent the Appellants emphasise the use of the words 'from the date of the first impugned payment', that is not relevant to the construction of s 588FA, which does not contain the word 'impugned' before the word 'transactions'.

15. In respect of *Petagna*, the FC was (with respect) correct in finding that it tends to support the view that the peak indebtedness rule did not have a place in the insolvency regime and lent support to the conclusion that Parliament intended creditors to have the benefit of earlier dealings within a continuing business

---

21 This is a reference to the objective assessment of the running account defence as described in a decision of the Supreme Court of the United States in *Union Bank v Wolas* 502 US 151, 161; 116 L Ed 2d 514 (1991) and cited in *Ferrier and Knight v Civil Aviation Authority* (1994) 55 FCR 28, at 45 (per Beaumont, Gummow and Lindgren JJ).

22 *G & M Aldridge Pty Ltd v Walsh* (2001) 203 CLR 662, at 675 (per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

23 *Acts Interpretation Act 1901* (Cth), s 15AA.

24 *Petagna Nominees Pty Ltd & Anor v AE Ledger* (1989) 1 ACSR 547.

25 *Queensland Bacon v Rees* (1966) 115 CLR 266.

26 FC, at [104].

27 FC, at [99].

28 FC, at [97], referring to *Queensland Bacon v Rees* (1966) 115 CLR 266, at 282.

relationship in determining whether a creditor has received a preference. The Court in *Petanga* placed reliance on the sixth of the principles distilled in relation to the running account defence[29] to find that the liquidator's freedom to choose any point in during the statutory period is 'a freedom to choose the point from which to seek to show the transactions have ceased to be part of the continuing business relationship'[30] and says nothing as to the timing of the start of the relationship.

16. This is clear in the language of the passage, which refers to the scrutiny to which payments in a running account may be subject 'if a point comes where payments are made with a view to terminating the running account, or greatly reducing the level of credit granted on account…'. That is, certain transactions may be impugned by the liquidator to prove the continuing business relationship ceased, at which point the creditor no longer has the benefit of the defence. Further support is lent to this conclusion that the decision concerned the date at which the continuing business relationship ceased when looking at Malcolm CJ's reasoning. Malcolm CJ said:

> Where the payment is not in pursuance of some isolated transaction but is integrally bound up with a series of transactions, it is the effect of the total transaction, of all the connected [sic] items, that has to be looked at…
>
> … [then set out the 6 principles referred to above]
>
> It follows that the liquidator can choose any point during the statutory period in his endeavour to show that from that point on there was a preferential payment. However, this does not mean that the connection between such a payment and dealings prior to the chosen date is to be ignored.[31]

17. The Full Court was with respect correct in drawing the distinction with the 'peak indebtedness' rule that permits the liquidator to choose when the 'continuing

---

29 (1989) 1 ACSR 547, at 564 (per Franklyn J with whom Malcolm CJ agreed).

30 FC, at [101].

31 *Petagna Nominees Pty Ltd & Anor v AE Ledger* (1989) 1 ACSR 547, at 564 (per Malcolm CJ with whom Wallace and Franklyn JJ agreed) (emphasis added).

business relationship' starts.[32] That right is inconsistent with the wording of s 588FA(3) since no right of election on the part of the liquidator is referred to in the provision, which speaks of 'all' the relevant transactions. The findings and reasoning of the Full Court in this regard were correct.

18. The reasons found by the FC decision for articulating that *Olifent* and the decisions that followed it were wrongly decided[33] are also correct:

(a) Firstly, as explained above, the plain language of the statute and the cases relied on in the Explanatory Memorandum did not express an intention to embody the peak indebtedness rule in s 588FA – there was no mention of the peak indebtedness rule or of the decision of *Rees*, which is said to be the genesis of the rule;[34]

(b) Secondly, the peak indebtedness rule cannot be reconciled with the doctrine of 'ultimate effect'[35] espoused in *Airservices* when the clear wording of s 588FA(3)(c) requires an assessment of 'all transactions' within the relevant period and all supplies that form part of the relevant 'continuing business relationship' to assess whether and, if so, the extent to which there is a voidable preference. That is consistent with the reasoning in *Richardson*[36] as explained in *Airservices*[37] and relied on in the FC decision;[38]

(c) Thirdly, the peak indebtedness rule is inconsistent with the stated purpose of Part 5.7B of the Act, which aims to do 'fairness' as between unsecured creditors who have engaged in fair dealings with the insolvent company. Moreover, the FC decision recognized that there is 'a certain degree of arbitrariness or unfairness that is inherent', although any unfairness 'appears to be a foreseeable consequence of the statutory regime', including the various relation back periods described in s 588FE of the Act, which may also be described as arbitrary.[39]

---

32 Ibid.
33 FC, at [111]-[123].
34 FC, at [90]-[91], [104].
35 Previous cases have referred to the 'net effect': see, eg, *Queensland Bacon v Rees* (1966) 115 CLR 266, at 282 (per Barwick CJ).
36 *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110, at 129, 132, 133, 135 (per Dixon, Williams and Fullagar JJ).
37 *Airservices Australia v Ferrier* (1996) 185 CLR 483, at 488-490 (per Brennan CJ).
38 FC, at [114]-[118].
39 FC, at [119]-[121].

19. The statutory period ('relation back period') for unfair preference claims in s 588FE(2)(b)(i) is 6 months before the relation back day,[40] though there are longer statutory periods prescribed for other types of voidable transactions in ss 588FE(3)-(6B) of the Act.[41] Relevantly, a liquidator can only bring an application to set aside a payment as an unfair preference if such payment was an 'insolvent transaction' as stipulated in s 588FE(2)(a). An 'insolvent transaction' is a transaction entered into at a time when the company is insolvent.[42] In this case, the companies were insolvent from 30 March 2012 onwards.[43]

20. Thus, in the present circumstances, the period during which the liquidators could apply to the Court to set aside payments made to creditors on the basis that they are unfair preferences is the period from 30 March 2012 through to 25 September 2012 (when the Appellant liquidators were appointed administrators of the companies[44]). To the extent that s 588FA(3) applies, the Court must consider 'all transactions' forming part of the continuing business relationship within that period as if they were a single transaction for the purposes of determining if the ultimate effect of the transaction is that there was a preference. That is, the liquidators are not entitled to elect just one or some of the transactions within the continuing business relationship for the purposes of obtaining a maximum return. To the extent that the liquidators seek to read in the word 'impugned' into s 588FA(1) in respect of transactions that are voidable, that is, as we have said above, contrary to the plain language of the provision.

21. The reasoning in the FC decision as to why the Parliament intended to abolish the 'peak indebtedness' rule when it enacted s 588FA(3), and did so on 'the plain language' of that provision[45] is correct and the principles in *Potter v Minahan*[46] have no application. Moreover, there is no inconsistency between the reasoning in the FC decision and the decision of this Court in *Airservices* because the peak indebtedness rule cannot be applied in considering the 'ultimate effect' of transactions that form part of the continuing business relationship, which would

---

40 As defined by s 91 of the Act.
41 FC, at [12], [122].
42 The Act, s 588FC.
43 FC, at [4].
44 FC, at [3].
45 FC, at [83], [90]-[91], [111]-[123].
46 (1908) 7 CLR 277.

involve the liquidator selecting a payment or payments in the middle of the 'single transaction' contrary to the plain words of s 588FA(3). The decision of the Full Court correctly construed the wording of s 588FA(3) (in particular the reference to 'all the transactions' in s 588FA(3)(c).

No cessation of continuing business relationship at time of payments 1-4

22. For the reasons which follow:

(a) the FC decision did not misstate or misapply the principles for determining 'where there is a mutual assumption of a continuing relationship of debtor and creditor' as set out by this Court in *Queensland Bacon v Rees*[47] and *Airservices v Ferrier*;[48] in relation to payments 1-4 (though it did misapply those decisions in relation to payments 5-11, for the reasons given below);

(b) if it did state the principles differently to *Sutherland v Eurolinx;*[49] the FC decision was right in relation to payments 1-4 and the Court in *Eurolinx* was wrong; and

(c) to the extent there is any difference between the two statements of principle, payments 1 and 2 (as defined in the FC decision[50]) were part of the continuing business relationship in any event, on either application of the relevant test on the facts as found by the trial judge and applied in the FC decision.[51]

23. The running account 'defence'[52] in s 588FA(3) applies where there is a mutual assumption that the making of payments by the debtor to the creditor are causally linked to the provision of goods or services on the statement of account, as established by prior commercial practice between the parties.[53] That is, the payments are seen as part of a wider transaction by which the supplier (creditor) maintains an ongoing commercial relationship with the debtor, accepting the debtor's payments in reduction of the balance of the running account established by

---

47 (1966) 115 CLR 266, at 285-286 (per Barwick CJ); see FC at [48].

48 (1996) 185 CLR 483, at 501-502, 504-505 (per Dawson Gaudron and McHugh JJ); see FC, at [48].

49 *Sutherland v Eurolinx* (2001) 37 ACSR 477; 19 ACLC 633.

50 FC, at [5].

51 FC, at [70]-[71].

52 *Hussain v SCR Building Products Limited* [2016] FCA 392, at [216] (per Edelman J). There has been criticism of the use of the word defence; Edelman J described it as a doctrine.

53 *Sutherland v Lofthouse* (2007) 213 FLR 157; 25 ACLC 1,416; [2007] VSCA 197, at [34]-[35] (per Nettle JA, with whom Neave and Redlich JJA agreed).

previous provision of goods or services on the assumption that future goods or services will be supplied.[54]

24. The Full Court in the present case correctly stated the applicable principles determining whether a payment was part of a continuing business relationship.[55] The FC decision correctly applied (in relation to payments 1-4) the majority's reasons of this Court in *Airservices*[56] in determining whether a payment made to a creditor is part of a continuing business relationship, or was a separate transaction for the purpose of s 588FA. That is, the Court must look to the substance of the payments, rather than the form, and whether there is an expectation that further debits and credits will be recorded.[57] This approach is consistent with the purpose of s 588FA(3) of the Act, to prevent what would otherwise be the unfairness to a creditor who continued to provide valuable goods and services to the company during the period defined in s 588FE(2)(b) thus enabling the company to continue to do business.

25. Knowledge, suspicion or reasonable grounds to suspect insolvency will not necessarily destroy a continuing business relationship, nor will a stop on a running account.[58] Payments may be made for the express purpose of reducing the debt owing on the account so long as the payment or payments are also made for the purpose of securing further goods or services when considering the transaction in the context of the ongoing commercial relationship;[59] and the element of mutuality must be present. This is so even if the debtor is paying down the account to induce the creditor to provide further goods or services.[60] In this regard, the evidence is key to the determination of whether or not a continuing business relationship existed and the parties to the transactions had a mutual assumption that goods or services would be provided on account going forward.

26. The evidence clearly shows in the present case that although Badenoch was concerned to ensure that it was paid for the services it provided to Gunns and

---

54 *Airservices Australia v Ferrier* (1996) 185 CLR 483, at 490 (per Brennan CJ).
55 FC, at [48(e)] (and the cases there cited).
56 Ibid, at 509 (per Dawson, Gaudron and McHugh JJ).
57 Ibid, 508. See also, *CSR Building Products Ltd* [2016] FCA 392; *Clifton v CSR Building Products Pty Ltd* [2011] SASC 103.
58 FC, at [48] (and the cases there cited).
59 *Airservices Australia v Ferrier* (1996) 185 CLR 483, at 501-503 (per Dawson, Gaudron and McHugh JJ).
60 Ibid, at 508.

Auspine, there was a mutual assumption that services would continue to be provided (and they were in fact provided).[61] The evidence of the directors of Badenoch was that they still had faith in Gunns and Auspine's plans (for restructuring) and believed them to still be 'backed by the banks'.[62] When asked whether Badenoch would be willing to provide 'almost normal deliveries' after a period where supply was stopped, Badenoch replied in the affirmative making reference to the ongoing supply contract but stated that it wanted 'adequate measures in place to protect [its] exposure and business'.[63] That is, there was a mutual assumption that services would be continued into the future following the negotiations in March 2012: payments 1 and 2 were made by Auspine to induce further supply from Badenoch, which further supply in fact occurred.

27. To the extent that *Eurolinx* has applied a test that states that there will be no mutual assumption of a continuing relationship where the purpose of inducing supply is 'subordinated to the predominant purpose of recovering past indebtedness';[64] that approach 'should be treated with some caution'.[65] This is because s 588FA(3) does not contain any reference to 'predominant purpose' in determining whether a continuing business relationship was in existence. The assessment of whether the creditor and debtor had a continuing business relationship is a question of fact, to be determined in substance not form, and without adding an additional gloss not found in the statutory provision. Moreover, the purpose underlying s 588FA(3) is to recognise that a series of payments made by a debtor to induce the provision of further valuable goods or services does not cause disadvantage to the unsecured creditors generally save to the extent that the total payments received exceed the value of the goods or services provided, which explains the existence of the 'defence' in the context of the unfair preference regime.[66] Badenoch continued to provide services to Auspine and Gunns which allowed their business to continue up until the appointment of administrators in September 2021. This added to the assets of the companies for the benefit of the general class of unsecured creditors

---

61 *Bryant, in the matter of Gunns Limited (in liq)(receivers and managers appointed) v Badenoch Integrated Logging Pty Ltd* [2020] FCA 713 ("Judgment"), at [34]-[35].

62 Judgment, at [38]-[39].

63 Judgement, at [48]-[49].

64 *Sutherland (as liquidator of Sydney Appliances Pty Ltd (in liq)) v Eurolinx Pty Ltd* (2001) 37 ACSR 477; 19 ACLC 633, at [147]-[148] (emphasis added).

65 FC, at [54].

66 Ibid.

and the Court should only find that there was a preference to the extent that the total payments exceeded the value of the goods or services provided.

28. For the Full Court to acknowledge that the mutual assumption of a continuing business relationship will not necessarily 'cease whenever the balance tips ever so slightly in favour of recovering past indebtedness'[67] is consistent with and mandated by the decision of this Court in *Airservices* that the Court must look at the practical relationship between the payments (that is, the 'ultimate effect' of the transaction)[68] to determine whether the parties are 'looking backwards rather than forwards'.[69] That assessment is necessary to ascertain whether the true nature of what occurred was the creditor seeking recovery of past indebtedness,[70] being a separate transaction for the purpose of s 588FA(3), or whether a payment forms part of a 'continuing business relationship', with an eye to future provision of goods and services pursuant to that relationship.

29. The reasoning in the FC decision did not import a 'sole purpose' test as argued by the Appellants[71]. Indeed, the FC decision said that 'if the sole purpose of a payment is to discharge an existing debt', rather than 'to induce the creditor to provide future goods or services', 'there is a preference' because a continuing business relationship will cease under s 588FA(3) where there is no mutual assumption that future services will be provided.[72] The assessment of whether or not s 588FA(3) is engaged is dependent on the evidence before the Court and whether there was a mutual assumption that there would be a future supply of good or services will turn on the facts of each case. In the present case, although Badenoch unsurprisingly took steps to ensure that it received payment for the services already provided and for the further services to be provided, it also intended to supply Auspine into the future and payments 1 and 2 acted as inducements for the mutual assumption underlying the relationship.

---

67 Ibid.

68 *Airservices Australia v Ferrier* (1996) 185 CLR 483, at 501-502; see also *Queensland Bacon v Rees* (1966) 115 CLR 266, at 286 (per Barwick CJ).

69 *Airservices Australia v Ferrier* (1996) 185 CLR 483, at 510.

70 FC, at [55].

71 Appellants' submissions [87]; Special Leave Application, [37].

72 FC, [56]. See also, *Airservices Australia v Ferrier* (1996) 185 CLR 483, at 504-506 (per Dawson, Gaudron and McHugh JJ).

30. Applying the principles stated by the FC decision[73], regardless of whether the *Airservices* test or the *Eurolinx* test is applied, payments 1 and 2 fall clearly within the continuing business relationship. That is because the nexus between the payments and the subsequent provision of services was, on the facts as found by the learned primary judge, never severed[74] and in particular Badenoch's 'serious initial reservations about Gunns' willingness and ability to pay' in March 2012 were addressed.[75] Although the respondent sought payment of past indebtedness in respect of specific invoices, both the respondent and the applicant continued to focus on the future supply of services of substantial value in their mutual dealings[76] and there was 'an expectation of future payment in the sense of there being a mutual assumption of a continuing relationship of debtor and creditor'.[77]

31. The provision of services was not subordinated to a predominant purpose (let alone a 'sole purpose') of discharging past indebtedness,[78] notwithstanding that Badenoch sought to ensure that it was paid so that it could provide future services. Throughout the period that payments 1, 2, 3 and 4 were made, the evidence clearly shows that the level of the applicant's net indebtedness to the respondent was 'increased and reduced from time to time as a result of the series of transactions forming part of the relationship' and there was a mutual expectation that further debits and credits would be recorded.[79] The payments 1-4 thus formed an 'integral part' of a 'continuing business relationship'.

32. The Full Court's characterisation of the course of the negotiations between the Applicant and the Respondent in the period prior to payments 1 and 2 was properly made in the context of inferences drawn from the evidence before the learned trial judge and her findings of fact.[80] In assessing the practical relationship between the parties at the relevant point in time, it is clear that the applicant and the respondent

---

73 FC, at [48]-[57].
74 FC, at [70]-[75].
75 FC, at [71].
76 FC,at [65]. *Airservices Australia v Ferrier* (1996) 185 CLR 483, at 510.
77 FC, at [70].
78 FC, at [67]. *Sutherland (as liquidator of Sydney Appliances Pty Ltd (in liq)) v Eurolinx Pty Ltd* (2001) 37 ACSR 477; 19 ACLC 633, at [147]-[148].
79 FC, [68], see also [69]-[75]. *Airservices Australia v Ferrier* (1996) 185 CLR 483, at 504-505.
80 FC, at [68]-[71].

were looking forwards rather than backwards and the mutual assumption of a continuing relationship of payment and reciprocal supply did not cease.[81]

33. The Full Court thus did not err in applying the principles in *Airservices*[82] to find that payments 1 and 2 formed part of the continuing business relationship. Nevertheless, whether the 'predominant purpose' test espoused in *Eurolinx* ought be applied is moot because, on the application of either test, on the facts as found below, payments 1 and 2 formed part of the continuing business relationship and therefore formed part of the single transaction for the purposes of sub-sections 588FA(1) and (3).

10 Part VI: respondent's argument on notice of cross appeal:

No cessation of continuing business relationship at time of payments 5-11

34. The Full Court erred in finding[83] that the change in the business relationship between the respondent and Gunns Limited and Auspine Limited in July 2012 terminated the continuing business relationship between them, with the result that payments 5-11[84] were not made as part of that relationship for the purposes of section 588FA(3). So much is apparent on the evidence. It is true that the parties had agreed that the relationship would not continue indefinitely and would terminate relatively soon on an unspecified date, but only after Auspine had sourced an alternative contractor.[85] That does not mean that the relationship was
20 not continuing and intended by the parties to be continuing between July and September 2012.

35. The respondent continued to supply logging and transport services between July and September 2012 and both Badenoch and Auspine acted on the mutual assumption that those services would be supplied going forward. In fact, on the day that the administrators were appointed to Auspine (and Gunns) on 25 September 2012, Badenoch was still working to supply Auspine in accordance with the supply agreement. One of the directors of Badenoch gave evidence that the 'work was

81 FC, [68].
82 (1996) 185 CLR 483.
83 FC, at [76]-[79].
84 As defined at FC, at [5].
85 Judgment, at [77], [79].

done to enable to Tarpeena Mill to continue to operate until such time as Gunns sourced someone else to perform the work'.[86] It can be readily inferred in the present factual matrix that payments 5-11 were made by Auspine to Badenoch to induce the provision of future services, with the expectation by both parties that future credits and debits would be recorded, albeit also with the intention that at some point in the future, that relationship would come to an end.

36. According to this Court in *AirServices Australia v Ferrier*[87] it is the "purpose of the payment"[88] which is relevant to whether it attracts the continuing business relationship exception to being a voidable preference. This Court said:

> … if the sole purpose of the payment is to discharge an existing debt, the effect of the payment is to give the creditor a preference of other creditors unless the debtor is able to pay all of his or her debts as they fall due. But if the purpose of the payment is to induce the creditor to provide further goods or services **as well as to** discharge an existing indebtedness, the payment will not be a preference unless the payment exceeds the value of the goods or services acquired. In such a case a Court, exercising jurisdiction under section 122 of the *Bankruptcy Act*, looks to the ultimate effect of the transaction. Whether the payment is or is not a preference has to be "decided not by continuing its immediate effect only, but by considering what effect it ultimately produced in fact.[89]
>
> If the purpose of a payment is to secure the asset or assets of equal or greater value, the payee receives no advantage over other creditors. The other creditors are no worse off and, where the value of the assets has increased, they are actually better off. Thus, a debtor does not prefer a

86 Judgment, [89].
87 (1996) 185 CLR 483, 501-503, at 509.
88 Ibid, at 502.
89 Ibid, at 501 (emphasis added).

> creditor to the other creditors if he or she pays a debt or part of it, to induce the creditor to supply goods of equal or greater value than the amount of the payment. In that situation, **it is no relevance that the debt that is discharged happens to be a stale one**. If the present value of the goods supplied is equal to or greater than the payment, the other creditors are no worse off. They are in the same position that they would have been if the parties had so structured the transaction that the debtor paid for the new supply of goods instead of discharging the old debt.[90] …
>
> Once the doctrine of ultimate effect is applied, it follows that the payments to AirServices gave it no preference, priority or advantage over the general body of creditors. On the contrary, the general body of creditors benefited from the revenues that were generated as a result of the services provided by and at the expense of AirServices. The value of the services provided exceeded the amount of the payments due in the relevant period by several million dollars.
>
> **To ignore the practical relationship between the payments and the subsequent supply of services and the ultimate effect of the dealings between the parties would not advance the purpose for which section 122[91] was enacted**.[92]

37. In *Sutherland v Lofthouse*[93], Nettle JA (Neave and Redlich JJA agreeing) said:

> 35. The essential feature of a running account is that it predicates a continuing relationship of debtor and creditor

90 Ibid, at 503 (emphasis added).
91 Of the then applicable *Bankruptcy Act* 1966.
92 *AirServices Australia v Ferrier* (1996) 185 CLR 483, at 509 (emphasis added).
93 (2007) 213 FLR 157; 25 ACLC 1416; [2007] VSCA 197.

with an expectation that further debits and credits will be recorded. Consequently, as Dawson, Gaudron and McHugh JJ said in *Airservices*, the record of the account will usually provide a solid ground for determining whether the parties conducted their dealings on the basis that they had a continuing business relationship and that goods or services would be provided and paid for on the credit terms ordinarily applicable in the creditor's business. On that basis, the court will usually be able to conclude whether the parties mutually assumed that from a business point of view each particular payment was connected with the subsequent provision of goods or services in that account[94]. But it is enough if on the facts of the case however discerned:

> …the court can feel confident that implicit in the circumstances in which the payment is made is a mutual assumption by the parties that there will be a continuance of the relationship of buyer and seller with resultant continuance of the relation of debtor and creditor in the running account, so that, to use the expressions employed in *Richardson's Case*, 'it is impossible' … in a business sense – 'to pause at any payment in the account and treat it as having produced an immediate effect to be considered independently of what followed …[95].

36. In this case an examination of the statement of the account strongly implies that it was mutually assumed from a business point of view that each particular payment was connected with the subsequent provision of goods or services on account. And the bulk of the other evidence to

94 *AirServices Australia v Ferrier* (1996) 185 CLR 483, at 507.

95 *Queensland Bacon v Rees* (1966) 115 CLR 266, 286; *AirServices Australia v Ferrier* (1996) 185 CLR 483, at 492.

> which I have referred is to the same effect. In the circumstances, I see no reason to doubt that it was implicit in the circumstances in which each payment was made that there would be a continuance of the relationship of buyer and seller with the resultant continuance of the relationship of debtor and creditor"[96].

38. The relevant purpose or purposes are those for which the payments are made and received and the 'mutual assumption' by the parties that there will be a continuance of the relationship is an integral part of the assessment of the facts of the case in establishing the continuing business relationship: *Queensland Bacon Pty Ltd v Rees*,[97] and *AirServices v Ferrier*.[98] The Full Court referred to each of these decisions in its reasons,[99] but fell into error in finding that the 'continuing business relationship' defence was not available when the purpose of inducing further supply was subordinated to a predominant purpose of recovering past indebtedness,[100] notwithstanding the Full Court accepted that the principles in *Eurolinx* ought be 'treated with some caution'.[101]

39. There is no warrant for the 'predominant purpose' test in the decisions of this Court in determining whether a continuing business relationship exists. It is sufficient to found an inference of a mutually assumed continuing business relationship if "the payments … possessed in point of fact a business purpose common to both parties which so connected them with the subsequent debits…"[102] Reducing existing indebtedness will almost always be a purpose of such a payment in the context of a continuing business relationship; it is only inconsistent with a such a relationship if it is the sole purpose.[103]

40. To the extent that *Sutherland as liquidator of Sydney Appliances Pty Ltd (in liquidation) v Eurolinx Pty Ltd*[104] and the other authorities cited by the Full Court[105]

---

96 *Sutherland v Lofthouse* (2007) 213 FLR 157; 25 ACLC 1416; [2007] VSCA 197, at [35]-[36].
97 (1967) 115 CLR 266, at 283-284, 285-286; citing *Richardson* (1952) 85 CLR 110, at 129, 133, 135.
98 [1996) 185 CLR 483, at 501-502 and 504-505 (per Dawson, Cauldron and McHugh JJ).
99 FC, at [47] and [48](a) and (c).
100 FC, at [76]-[79].
101 FC, at [54].
102 *Richardson* (1952) 85 CLR 110, at 133.
103 *Airservices Australia v Ferrier* (1996) 185 CLR 483, at 501-502.
104 (2001) 37 ACSR 477; 19 ACLC 633, at [148].

conflate the 'sole purpose' and 'predominant purpose' tests, the Full Court and the other courts cited are wrong. That is because what they say is inconsistent with two decisions of this Court which while relating to the formerly applicable to section 122 of the *Bankruptcy Act* 1966[106] and section 95 of the *Bankruptcy Act* 1924[107], were still determining whether payments alleged to be voidable preferences could be said to be part of "a continuing business relationship". The use of that exact phrase by the Parliament in section 588FA(3) of the *Corporations Act* 2001 can only mean that the Parliament intended the preexisting "continuing business relationship" defence for voidable preference purposes to continue to apply. The continuing business relationship is destroyed if the 'sole purpose' of making the payment is to reduce existing indebtedness, and inducing the future supply of goods and services is not a purpose of the making and receipt of the payment as was the case for the last payment in *Airservices*.[108] That is not the case in the present circumstances. Both purposes existed at the time of each payment.

41. Here, on the facts found by the Full Court[109] while it was intended that the relationship between the respondent and Gunns Limited 'transitioned to a mutually acceptable termination of the agreement at the end of 3 or 4 months' and that there be 'a gradual tapering off [of services] while the other contract gets up to speed,'[110] the parties mutually intended their business relationship to continue until that occurred. Services would still be supplied on account and the parties' relationship as buyer and seller and debtor and creditor would continue until the new arrangements were in place. Thus, the purpose of Gunns Limited making payments 5 to 11[111] was to induce the further supply of transport and logging services by the respondent, and was not 'subordinated to a sole or predominant purpose of discharging an existing debt',[112] even if that is the applicable test, which for the reasons given above it was not.

---

105 FC, at [48] to [49].
106 *Airservices Australia v Ferrier* (1996) 185 CLR 483.
107 *Rixhardson* (1952) 85 CLR 110.
108 *AirServices Australia v Ferrier* [1996] 185 CLR 483, at 501.
109 FC, at [76] to [79].
110 FC, at [78].
111 As identified in [2021] FCAFC 64, at [5].
112 FC, at [40], [49].

42. Further, the other creditors of Gunns Limited and Auspine Limited gained the benefit of those services which were of value to those companies (because they obtained timber which could be processed and sold). In those circumstances, payments 5 to 11 cannot be said to constitute a preference in circumstances where the value of the goods and services provided in the relevant period overall exceeded the amount of the payments made. That is particularly so in light of the use by the Parliament in section 588FA(3)(c) of the *Corporations Act* of the expression 'applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction'.

10 43. Authorities relied upon:

(a) *Richardson v The Commercial Banking Company of Sydney Ltd* (1952) 85 CLR 110, 129, 133, 135;

(b) *Queensland Bacon v Rees* (1967) 155 CLR 266 at 285-286 per Barwick CJ;

(c) *Petagna Nominees Pty Ltd & Anor v AE Ledger* (1989) 1 ACSR 547;

(d) *AirServices Australia v Ferrier* (1996) 185 CLR 483 at 501-505, 507, 509;

(e) *Sutherland v Lofthouse* (2007) 213 FLR 51, 57; 25 ACLC 1416; [2007] VSCA 197, at [35]-[36].

Part VII: Orders sought.

44. The respondent seeks the orders set out in the notice of cross appeal.

20 Part VIII: Time estimate

45. The respondent considers that 2 hours will be required for presentation of its oral argument.

Dated: 3 June 2022.

Michael Gronow
(03) 9225 7115
michaelgronow@bigpond.com
Counsel for the respondent.

Reegan G Morison
(03) 9225 7892
reegan.morison@vicbar.com.au

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY No. A10 of 2022

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA (FULL COURT)

BETWEEN:

BRYANT & ORS AS LIQUIDATORS OF GUNNS LTD and AUSPINE LTD

Appellants

and

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

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

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

No.	Title	Provision(s)	Version
		Statutory Provisions	
1.	*Acts Interpretation Act 1901* (Cth)	s 15AA	Historical version (27 December 2011 – 11 April 2013)
2.	*Corporations Act 2001* (Cth)	ss 588FA, 588FA(1), 588FA(3), 588FA(3)(a), 588FA(3)(b), 588FA(3)(c), 588FA(3)(d), 588FE(2), 588FE(3)-(6B), 588FF, 588FA(2), 588FI 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)