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

ADELAIDE REGISTRY

A10/2022

ON APPEAL FROM THE FULL COURT

OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

DANIEL MATTHEW BRYANT, IAN MENZIE CARSON AND CRAIG DAVID CROBIE 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/ Cross-Respondents

and

BADENOCH INTERGRATED LOGGING PTY LTD (ACN 097 956 995)

Respondent/Cross-Appellant

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of propositions to be advanced in oral argument

The peak indebtedness rule is inconsistent with the wording of s 588FA

2. The Court must give effect to the purpose of the provision as written, having regard to other relevant sections. Where s 588FA(3)[1] applies, the use of the word 'all' mandates that the 'single transaction' considered for the purpose of s 588FA(1) involves a consideration of all transactions within the relation back period set by s 588FE(1).

3. The use of the word 'all' in s 588FA(3)(c) is inconsistent with the liquidator choosing the starting point of the continuing business relationship so that s 588FA(1) only applies to some of the relevant transactions within the relation back period. The plain language of the provision is inconsistent with the operation of the 'peak indebtedness' rule and does violence to the words, meaning and purpose of s 588FA(3).

4. The statements of Barwick CJ in *Queensland Bacon,*[2] and Malcolm CJ in *Petagna Nominees Pty Ltd*[3] referred to in the Explanatory Memorandum[4] do not support the continued application of the 'peak indebtedness' rule. Barwick CJ referred to "*the*

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1 Of the *Corporations Act* 2001 (Cth). All statutory references are to this Act unless stated otherwise.
2 *Queensland Bacon v Rees* (1966) 115 CLR 266, at 282 (Joint Book of Authorities, tab 22, 561).
3 *Petagna Nominees Pty Ltd & Anor v AE Ledger* (1989) 1 ACSR 547 at 564 (Joint Book of Authorities, tab 41, 564).
4 Joint Book of Authorities, tab 51, p 1434 at para [1042].

terminal date for consideration of the state of the running account being for that reason 'earlier than the date of the commencement of the liquidation'"[5] rather than to the starting date of the continuing business relationship.

5. The peak indebtedness rule undermines policy objectives of the running account defence of encouraging suppliers to continue to deal with companies in financial difficulties and not penalising those who augmented the company's available assets by supplying valuable goods and services[6]. Moreover, it is inconsistent with authority in this Court in *Richardson*,[7] *Queensland Bacon*[8] and *Airservices Australia v Ferrier*,[9] which refer to the assessment of the 'effect', 'net effect' or the 'ultimate effect' of the whole transaction[10] (comprising the transactions in a running account or continuing business relationship during the relevant period[11]) to determine whether there is a preference, priority or advantage given over other creditors. That construction is consistent with the words, meaning and purpose of ss 588FA(1) and (3) as enacted.

Continuing business relationship

6. If a purpose of the relevant transaction, common to both parties, is connected with the subsequent provision of goods or services instead of the only past delivery of goods or services, there is still a continuing business relationship [12] for the purposes of s 588FA(3). That is so even where it is accepted that the payments are made for the purpose of reducing the balance owing, so long as it is contemplated by both parties that further credit will be extended and further services provided.[13]

7. There is no requirement that the continuing business relationship will continue indefinitely; it is not necessary that the credit arrangement be determined expressly.[14]

8. A continuing business relationship will be terminated when a payment is made 'simply to discharge a debt'[15] with no mutual intention or contemplation as to future dealings that would give rise to further credits and debits between the debtor and creditor. That is, if the sole purpose of the impugned payment is to discharge an existing debt, the effect of such a payment will be a preference unless the debtor is otherwise solvent.[16]

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5 *Queensland Bacon v Rees* (1966) 115 CLR 266, at 282 (Joint Book of Authorities, tab 22, p 561).
6 *Airservices Australia v Ferrier* (1996) 185 CLR 483, 509-510 (Authorities, tab 12, pp 156-157).
7 See, eg, *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110, at 129, 132, 133, 135 (Dixon, Williams and Fullagar JJ) (Joint Book of Authorities, tab 24, pp 652, 655, 656, 658.
8 *Queensland Bacon v Rees* (1966) 115 CLR 266, at 282 (Joint Book of Authorities, tab 22, p 561).
9 *Airservices Australia v Ferrier* (1996) 185 CLR 483, at 488-490 (Brennan CJ) (Joint Book of Authorities, tab 12, pp 135-137).
10 *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110, at 129, (Dixon, Williams and Fullagar JJ) (Joint Book of Authorities, tab 24, p 652).
11 As defined by s 588FE.
12 *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110, 133, at 135 (Dixon, Williams and Fullagar JJ) (Joint Book of Authorities, tab 24, pp 656, 658).
13 *Airservices Australia v Ferrier* (1996) 185 CLR 483, 490-491 (Brennan CJ); 501-503, 509-510 (Dawson, Gaudron and McHugh JJ) (Joint Book of Authorities, tab 12, pp 137-138; 148-150, 156-157).
14 *Aisrservices Australia v Ferrier* (1996) 185 CLR 483, at 492 (Joint Book of Authorities, tab 12, p 139).
15 *Airservices Australia v Ferrier* (1996) 185 CLR 483, at 493 (Joint Book of Authorities, tab 12, p 140).
16 *Airservices Australia v Ferrier* (1996) 185 CLR 483, at 502 (Dawson, Gaudron and McHugh JJ) (Joint Book of Authorities, tab 12, p 149).

9. To the extent that *Eurolinx*[17] has applied a test stating there is no mutual assumption of a continuing business relationship where the purpose of inducing further supply is '*subordinated to the predominant purpose of recovering past indebtedness*'[18]; that statement is contrary to authority of this Court (including *Airservices Australia v Ferrier*[19]) and the express wording of s 588FA(3). Even in *Eurolinx*, the Court held that payments that form part of a continuing business relationship '*must continue to have as at least one operative, mutual purpose... inducing further supply*'[20] (correctly applying the principles stated by this Court).

10. Even knowledge, suspicion or reasonable grounds to suspect insolvency will not necessarily destroy a continuing business relationship.[21] Indeed, s 588FA(3) will only in practice apply where a creditor has had a continuing business relationship with an insolvent company, since the payment will only be voidable under s 588FE (2) if it was also an 'insolvent transaction' under s 588FC.

Cross-appeal

11. Special leave ought be granted and the cross-appeal allowed for the reasons stated above in respect of the 'continuing business relationship'. Whether a continuing business relationship has ended is a question of fact. In the present case, on the evidence, there was no cessation of the continuing business relationship prior to the appointment of administrators to the companies: the respondent continued to perform services and receive payments with a view to the continuing supply of services,[22] among other things. Changes in the relationship and an agreement to terminate it in the near future[23] do not mean it actually was terminated prior to September 2012.

12. As at the date that Auspine and Gunns went into administration on 25 September 2012 there was still a mutual intention for services to be provided and paid for and debits and credits to be recorded as between Auspine and Badenoch into the future, though it was intended the relationship was to be terminated at a date in the future ('*the end of three or four months*' from 31 July 2012[24]). Accordingly, all 11 payments were within the continuing business relationship and it did not cease during the statutory period.

Dated: 18 October 2022

Michael G R Gronow

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Name: Michael G R Gronow, counsel for the respondent/applicant for leave to cross appeal.

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17 *Sutherland (as liquidator of Sydney Appliances Pty Ltd (in liq)) v Eurolinx Pty Ltd* (2001) 37 ACSR 477; 19 ACLC 633, at [148], [151] (Joint Book of Authorities, tab 46, pp 1270, 1271).

18 *Sutherland v Eurolinx*, at [148] (Joint Book of Authorities, tab 46, p 1270) (emphasis added).

19 (1996) 185 CLR 483, at 490-491, 501-503 (Joint Book of Authorities tab 12, pp 137-138, 148-150).

20 *Sutherland (as liquidator of Sydney Appliances Pty Ltd (in liq)) v Eurolinx Pty Ltd* (2001) 37 ACSR 477; 19 ACLC 633 at [148] (Joint Book of Authorities, tab 46, p 1270) (emphasis added).

21 *Airservices Australia v Ferrier* (1996) 185 CLR 483, at 509-510 (Dawson, Gaudron and McHugh JJ) (Joint Book of Authorities, tab 12, p 156-157.

22 See Appellant's Book of Further Materials Vol II, tab 126, p 816, lines 4-12 transcript re-examination of Peter Badenoch; see also cross examination at pp 801-815.

23 Full Court [2021] FCAFC 64 at [67], [76]-[79] (Core Appeal Book tab 9, pp 104, 106-107).

24 Full Court [2021] FCAFC 64 at [78] (Core Appeal Book tab 9, p 106).