HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **JOHN MAXWELL MORGAN**
First Appellant
SYDNEY ALLEN PRINTERS PTY LTD (IN LIQUIDATION)
Second Appellant
SYDNEY ALLEN MANUFACTURING PTY LTD (IN LIQUIDATION)
Third Appellant
and
MCMILLAN INVESTMENT HOLDINGS PTY LTD
First Respondent
AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: These submissions are in a form suitable for publication on the internet.

Part II: In addition to the issues sought to be raised by the Appellants in Part II of the Appellants' submissions (**AS**), this appeal concerns whether, pursuant to s601AH(5) of the *Corporations Act 2001* (Cth) (**Act**), a deregistered company, which was in a creditors' voluntary liquidation prior to deregistration, upon its reinstatement under s601AH(2) is deemed or taken to have owned property and to have carried on jointly with another company, also in a creditors' voluntary liquidation, a business, a scheme or an undertaking within the meaning of s579E(1)(b)(iv) during the period of its dissolution.

Part III: No notice under section 78B of the *Judiciary Act 1903 (Cth)* is required.

Part IV: <u>The Appellants' narrative of facts or chronology which the First Respondent contests</u>

1. Paragraph 8 of Part V of the *AS* is contested. The Appellants assert an alleged right of the Second Appellant, Sydney Allen Printers Pty Ltd (in liquidation) (**SAP**), and of the Third Appellant, Sydney Allen Manufacturing Pty Ltd (in liquidation) (**SAM**), to jointly sue for what they allege is part of the moneys ($300,000 (excluding GST) **($300,000 Payment**)) which SAP and SAM should have received from the sale of

their colour printing business (described by the primary judge at **PJ**[1] **[3] and [12]-[14] (CAB 9 and 14)** (**Printing Business**), where such sale of the Printing Business (**Printing Business Sale**) was undertaken in their insolvency administrations (**Alleged Chose**). The Appellants allege the true purchase price was $1.6M, not the $1.3M disclosed in the Sale of Business Agreement (**SBA**)[2], and describe this as the Diverted Funds. The First Respondent's position is that: (a) it is not common ground, and it is contested that the Appellants were deprived of part of the purchase price; (b) the Alleged Chose is nothing more than a mere allegation; (c) the Appellants describing the $300,000 Payment as Diverted Funds does not turn a mere allegation into fact; (d) the Alleged Chose has poor prospects; (e) Markovic J (in dissent) recorded at **FC [241] (CAB 98**) that the Appellants (the respondents in the FC) accepted that the Alleged Chose arose upon the Printing Business Sale, without indicating whether sale meant exchange or completion. There was no acceptance by the First Respondent (the appellants in the FC) that sale meant exchange. It was not common ground that the Appellants were deprivded of part of the purchase price; (f) the Alleged Chose arose upon completion of the SBA on 1 July 2016, and not upon the exchange of the SBA, on 4 May 2016, nor upon the purchaser making the $300,000 Payment, on 5 May 2016. These matters are dealt with further in paragraphs 2 to 5 below.

Part V: <u>The First Respondent's statement of argument in answer to the Appellants' argument</u>

The existence, if at all, and time of accrual of the Alleged Chose is contested

2. *AS* [11]-[14] is wrong in contending that the Alleged Chose came into existence, if at all, on 5 May 2016. The Alleged Chose arose on 1 July 2016 as: (a) the Printing Business Sale was governed by the terms of the SBA[3]; (b) 1 July 2016 was the "*Completion Date*"[4] of the SBA; (c) the outstanding balance of the purchase price (less the deposit) was due on the "*Completion Date*"[5] – accordingly, the outstanding balance or part thereof (including the alleged $300,000 Payment) was not due on the

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[1] *Morgan v Sydney Allen Manufacturing Pty Ltd (in Liq)* [2021] FCA 1669 (**PJ**).
[2] The SBA is at First Respondent's Book of Further Materials (**RFM**) at **5 to 28**.
[3] The SBA is at **RFM 5 to 28.**
[4] Definition of "*Completion Date*" in clause 1.1 of the SBA, being the date of the payment by the buyer of the outstanding balance of the purchase price less the deposit, within eight weeks of the "*Commencement Date*" (also defined in Clause 1.1 SBA as 5 May 2016) at **RFM 7.**
[5] Clause 3.1.4 SBA at **RFM 10.**

commencement of the SBA on 5 May 2016[6]; (d) the sale of the Printing Business took effect from the *"Completion Date"*[7]; (e) if there was any right in the seller to receive the $300,000 Payment (which there was not) that right could not have accrued until completion; (f) if the SBA had not completed there would have been no asserted right to the Alleged Chose. Accordingly, all the material facts had not occurred until the "*Completion Date"* on 1 July 2016. Beach J was correct in finding at **FC [148] (CAB 74**) that the Alleged Chose arose on 1 July 2016.

3. Further, the Alleged Chose is nothing more than a mere allegation. The totality of the evidence relied on in relation to the Alleged Chose was summarized by the primary judge at **PJ [23]–[26]**, **[36]** and **[90]** (**CAB 16-17, 19** and **32**). The SBA was executed by the Receiver on behalf of SAP and by Mr Geoffrey Davis as joint and several liquidator of SAM[8]. The McMillan parties did not have any power to direct the Receiver or SAM Liquidator to accept the alleged reduced purchase price and both of them had statutory duties including the Receiver's duty not to sell at an undervalue[9]. Clause 14.1 of the SBA contained an entire agreement/no representations clause[10]. Pre-contractual negotiations for a higher amount could not be determinative of the price. At its highest, the evidence disclosed that an entity associated with the First Respondent, MGS, raised an invoice "*on <u>prepaid</u> terms*"[11] (services to be provided in the future), to PWA, the purchaser, for $330,000 for "*…services provided in connection with printing plant and equipment*"[12] and that this transaction occurred at or about the time the SBA was entered into for $1.3M. A payment by the purchaser to a non party to the SBA prior to the completion, in the circumstances where the purchaser could not be compelled to pay the vendors (SAP and SAM) the balance of the purchase price (less deposit) until the SBA's completion, is neither part of the purchase price nor an amount which SAP and SAM, have a right to "repayment of" as alleged in *AS* [10]. A claim for repayment: (a) if a claim by the purchaser, has not been made and is not a chose in action and thus not property of SAP and SAM; (b) if a claim by SAP and SAM, has no factual basis as SAP and SAM did not make the $300,000 Payment and so there is no repayment to

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[6] Clause 1.1 SBA definition of "*Commencement Date*" being 5 May 2016 (the day after the SBA was executed) at **RFM 7.**
[7] Clause 2.1 SBA at **RFM 9.**
[8] SBA at **RFM 23.**
[9] Section 420A (Receiver) and section 180(1) (SAM Liquidator).
[10] **RFM 19.**
[11] **PJ [25] CAB 17.**
[12] Ibid.

be made to them. There was no evidence from PWA even though its director had been examined by the SAP Liquidator. The primary judge sought to overcome these deficiencies by stating that the First Respondent led no evidence on the matter[13]. The First Respondent was not required to and the Alleged Chose was only proffered as the evidentiary gateway for the pooling order in closing oral submissions by the Appellants after evidence had closed.

4. The Appellants have not sought to assert the Alleged Chose against either the purchaser (for failure to pay the balance of the purchase price) or the Receiver (for breach of duty under section 420A for sale at an undervalue). The Appellants have also failed to identify any sustainable cause of action against MGS.[14]

5. It was in this unsatisfactory state, where, after giving up two other bases to satisfy the jurisdictional gateway, the Appellants on the last day of the primary hearing, in closing submissions, first proffered the Alleged Chose as providing the gateway through which jurisdiction to make a pooling order was enlivened.

Section 579E(1)(b)(iv)

6. Section 579E(1)(b)(iv) is a jurisdictional gateway provision which had to be satisfied before any pooling order could be made. Section 579E(1)(b)(iv) required the court to be satisfied on the evidence that there was not only "*particular property*" presently owned (at the time of the primary hearing/decision)[15] by one or both of SAP and SAM, but that the "*particular property*" *"is or was used, or for use, by any or all of the companies in the Group* [SAP and/or SAM] *in connection with a business, a scheme or an undertaking, carried on jointly by the companies in the group* [SAP and SAM]".

7. It is not in issue that a chose in action (intangible property) may constitute '*particular property'* for the purposes of s579E(1)(b)(iv)[16]. The alleged *'particular property"* in

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[13] **PJ [26] CAB 17.**
[14] FCAFC appeal hearing transcript pages 12 and 13 at **RFM 31-32.** .
[15] (a) *Re Australian Hotel Acquisition (in liq)* [2011] NSWSC 1374 at [43] (Windeyer J).
(b) *Re Australian Hotel Acquisition (in liq)* [2011] NSWSC 1374 was approved and applied in *Re Lombe* (2011) 87 ACSR 84 at [44], [47] (Barrett J).
[16] Section 9 definition "*property … includes a thing in action*"; *Re Lombe* (2011) 87 ACSR 84 at 96 [58] (Barrett J).

this proceeding is the Alleged Chose. Whether the Alleged Chose satisfied the statutory requirements of s579E(1)(b)(iv) is in issue.

8. In the judgment of the Full Federal Court at **FC[17] [60]-[65] (CAB 57-58**), Yates J set out the relevant legal principles established by the cases for construing s579E(1)(b)(iv) and, having done so, correctly stated at **FC [59] (CAB 57**): *"The parties do not suggest that we should depart from these cases*". Yates J and Beach J, in the majority, did not depart from these principles in their application to the particular facts.

Interplay between s493 and s579E(1)(b)(iv)

9. Section 579E(1)(b)(iv) does not permit the Court, when considering whether the gateway provision is satisfied, to put to one side the limitations on what companies in a creditors' voluntary winding up have power to do. Whether the jurisdictional gateway in s579E(1)(b)(iv) was satisfied on the facts of this case must be considered in the context of s493. Section 493 created a statutory limitation upon, and fettered, the power to carry on a business, a scheme or an undertaking: (a) by SAM, from 7 April 2016, when SAM was placed into a creditors' voluntary liquidation; and (b) by SAP, from 13 May 2016, when SAM was placed into a creditors' voluntary liquidation[18]. Section 493 provides: *"The company must, from the passing of the resolution, cease to carry on its business except so far as is in the opinion of the liquidator required for the beneficial disposal or winding up of that business, but the corporate state and corporate powers of the company, notwithstanding anything to the contrary in its constitution, continue until it is deregistered."* Contrary to *AS* [13], s477(1)(a)(i) has to be read subject to, and does not override, s493. Section 477(1)(a), using materially the same language as s493, merely addresses the liquidator's powers whereas s493 is directed to the limitation placed on the company in a creditors' voluntary liquidation.

10. The only business which s493 empowered SAP and SAM in a creditors' voluntary liquidation to carry on jointly was the business as it existed when the resolution for

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[17] *McMillan Investment Holdings Pty Ltd v Morgan* [2023] FCAFC 9 (**FC**).

[18] (a) SAP: initially placed into voluntary administration on 7 April 2016 (section 436A(1)) . On 13 May 2016, At SAP's second meeting of creditors the SAP creditors resolved that SAP be wound up (section 439C(1)). Thereupon, SAP was placed into a deemed creditors winding up (section 446A(1)(a), (2) and (3), 499(2)(a) and (2A)). See **FC [14] (CAB 50); FC [22] (CAB 51)**).

(b) SAM: was placed into a creditors voluntary winding up on 7 April 2016 pursuant to a resolution of its members (section 491(1)). See **FC [13] (CAB 50)**.

winding up was passed or was taken to have been passed[19]. This was the Printing Business. SAP and SAM ceased to carry on the Printing Business no later than on 1 July 2016 when the SBA was completed.

The Alleged Chose is or was not used, or for use, in connection with a business, a scheme or an undertaking carried on by SAP and SAM jointly

11. Any steps which SAP and SAM might have taken (but did not take) to enforce the Alleged Chose (which came into existence, if at all, on 1 July 2016): (a) would not have been steps in carrying on the s493 business; (b) rather, they would have been steps taken in the separate and discrete insolvency administrations of SAP and SAM applying the principle that *"Ordinarily a winding up is conducted on a stand-alone specific entity basis"* [20]. Absent a pooling order and then only from the making of that order, the separate legal entity doctrine, and the provisions of the *Act* relating to the administration of insolvent companies, prevented the assets of one insolvent company (SAP) from being made available to satisfy the debts of creditors of another insolvent company (SAM) and vice versa. Under this doctrine, the assets and liabilities of SAP and of SAM were treated separately[21], and debts owing to creditors of SAP and of SAM respectively had to be satisfied exclusively from the separate assets of SAP and of SAM [22]. The liquidators of SAP and of SAM were legally required to conduct the two liquidations separately. Until SAM's deregistration on 10 June 2018, in conformity with these legal principles, the SAP and SAM liquidators carried on two stand-alone liquidations which was correctly found by Beach J at **FC [142] (CAB 73)**.

12. When the Alleged Chose came into existence, if at all, on 1 July 2016, and until SAM's deregistration, on 10 June 2018, SAP and SAM, whether jointly or separately: (a) carried on nothing in connection with the Alleged Chose; (b) took no

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[19] *Crouch Re Heritage Fine Wines Pty Ltd* (2007) 214 FLR 244 at [23](Barrett J):
"*As I have said, the power of a liquidator to carry on the business in a voluntary winding up is, because of s493, confined to the business as it existed when the resolution for winding up was passed or is taken to have been passed."*

[20] *Re Watch Works* [2020] WASC 6 at [31].

[21] (a) Section 516.
(b) *Adams v Cape Industries Plc* [1991] 1 All ER 929 at 1019.
(c) *The Albazero* [1977] AC 774 at 807.
(d) *Salomon v Salomon & Co. Ltd* [1897] AC 22.

[22] (a) *Walker v Wimborne* (1976) 137 CLR 1 at 6-7.
(b) *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 at 577.
(c) *Wimbourne v Brien* (1997) 23 ACSR 576 at 581.

steps to assert the Alleged Chose by making a demand for or by commencing a proceeding to recover the $300,000 Payment. Nothing (let alone a business, a scheme or an undertaking) was carried on by SAP and SAM, whether jointly or separately, in connection with the Alleged Chose (see further paragraphs 13, 20 to 22, 25 and 31 below). SAM's creditors' reports issued by the SAM liquidator indicate that the SAM liquidator did nothing at all in relation to SAM's affairs (which included the Alleged Chose)[23]. SAM just sat there completely inactive[24]. The same position existed in SAP in connection with the Alleged Chose[25]. This remained the position when, on 5 April 2018, nearly two years after the Printing Business was sold, the SAM liquidator requested ASIC to deregister SAM as there were *"no funds left in the creditors' voluntary liquidation to hold a final meeting and also the affairs of the company are fully wound up"*[26]. Nothing further was done by SAP and/or SAM in relation to the Alleged Chose and, on 10 June 2018, SAM was deregistered. Beach J accurately summarized this evidence and held at **FC [147] (CAB 73-74)** that: (a) SAM had ceased trading three years before its liquidation; (b) SAM did nothing during its liquidation; (c) SAM neither recovered any debts nor made payments to any creditors during its liquidation; and (d) on 5 April 2018, SAM's Liquidators requested ASIC to deregister SAM "*as its affairs are fully wound up*".

13. The mere existence, if at all, in SAP and SAM (until SAM ceased to exist upon its deregistration) of an alleged right to sue (the Alleged Chose), but where the Alleged Chose was unappreciated and SAP and SAM took no steps to enforce it (by demand or court proceeding) did not encompass what is meant by a business, a scheme or an undertaking in s579E(1)(b)(iv). A *"business"* is *"a commercial enterprise as a going concern"*[27] / *"some enterprise...pursued with a view to pecuniary gain* "[28]. A *"scheme"* is a program or plan of action.[29] An *"undertaking"* in its context means

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[23] **FC [147] CAB 73.**

[24] (a) The 11 May 2017 SAM Creditors Report at states there were no receipts or payments in SAM's liquidation from 7 April 2016 to 7 April 2017: **FC [147] CAB 73**.
(b) The SAM Liquidators issued no further Creditors Reports before indicating its affairs were fully wound up on 5 April 2018: **FC [147] CAB 73-74.**

[25] **FC [148] CAB 74**.

[26] **PJ [4] (CAB 9), PJ [82] (CAB 30)**.

[27] *Hope v Bathurst City Council* (1980) 144 CLR 1 (Mason J) at 8.

[28] *Luckins v Highway Motel (Carnarvon)Pty Ltd* (1975) 133 CLR 164 at [10], 178 (Gibbs J); see also *Black's Law Dictionary- Eighth Edition*

[29] (a) *Clowes v Federal Commissioner of Taxation* [1954] 91 CLR 209 at 255 (Kitto J):
"The word 'scheme' is not satisfied unless there is some programme, or plan of action".

an enterprise or business[30]. Further, this unappreciated passive existence, if at all, of the Alleged Chose in SAP and SAM (until SAM ceased to exist) is not encompassed within the meaning of *"carried on jointly by"* in s579E(1)(b)(iv). "*Carrying on*" involves "*the habitual pursuit of a course of conduct*".[31] To "*carry on business*" signifies a course of conduct involving the performance of a succession of acts, and not simply the effecting of one solitary transaction.[32] Nothing was *"carried on…by"* SAP or SAM where no act or conduct was undertaken by them. Nor was anything carried on *"jointly"* by SAP and SAM. *" `Jointly' does not connote merely action in unison but extends also to circumstances in which there is co-ordinated or co-operative action, with the separate acts of each participant complementing or supplementing acts of the others."* [33] in connection with a business, a scheme or an undertaking carried on by all the companies sought to be pooled. Beach J dealt with this at **FC [141]-[142]** and **[149]** (**CAB 72 to 74**) and correctly held that any proceedings which SAP and SAM might have brought, but did not, to recover funds under the Alleged Chose would not have been an undertaking carried on jointly by them and SAP and SAM would have been required to apply recoveries in their separate liquidations. These are fundamental principles of insolvency law embedded in the provisions of the *Act*, its regulations and rules and the case law. The meaning of the relevant phrase in s579E(l)(b)(iv) must be construed and informed by these fundamental principles.

(b) *Australian Softwood Forests Pty Ltd v Attorney-General (NSW)* (1981) 148 CLR 121 at 129 (Mason J (Gibbs CJ and Stephen J agreeing)), wherein Mason J approved and applied the definition of "*scheme*" in *Clowes v FCT* in (a) above.

(c) *XCO Pty Ltd v Federal Commissioner of Taxation* (1971) 124 CLR 343 at 349 (Gibbs J), applying Kitto J in *Clowes v FCT* in (a) above.

(d) *Re Lombe* (2011) 87 ACSR 84 at [28] (Barrett J), where his Honour adopted the authorities in (a) and (b) above for the definition of "*scheme*" in section 579E(1)(a)(iv).

[30] (a) In *R v Associated Octel Co Ltd* [1994] 4 All ER 1051 at 1061–1062 Stuart-Smith, LJ considered what is meant by the term *"undertaking"* in an OHS duty of care context: "…*In our judgement, Mr Carlisle is right. The word* ***'undertaking' means 'enterprise' or 'business'***. (emphasis added).

(b) In *Top of the Cross Pty Ltd v Commissioner of Taxation (Cth)* (1980) 50 FLR 19 at [36] it was stated: "…*Frequently the word 'undertaking' is used in circumstances where it could be interchanged with either the word business or enterprise and with varying shades of meaning... sometimes as a synonym for business…*".

(c) In the context of s597E(1)(iv), *"undertaking"* has been held to apply to the common management of an number of businesses carried on by separate companies as a single undertaking: *Re Watch Works* at [62] (Vaughan J).

[31] (a) *Premier Automatic Ticket Issuers Ltd v Federal Commissioner of Taxation* (1933) 50 CLR 268 at 298 (Dixon J).

(b) Applied in *Re Lombe* (2011) 87 ACSR 84 at [28] (Barrett J).

[32] *Smith (on behalf of National Parks and Wildlife Service) v Capewell* (1979) 142 CLR 509 at 519 (Gibbs J).

[33]; *Re Lombe* (2011) 87 ACSR 84 at 90 [26] (Barrett J) referring to *Allen v Feather Products Pty Ltd* (2008) 72 NSWLR 597 at [14]-[19] (Barrett J).

14. The Appellants' attempt to address these matters at *AS* [26] *"that separate liquidations were carried on does not detract from the fact that there was a joint chose in action which existed at the time"* goes nowhere. Firstly, it does not engage with the matters in paragraphs 9 to 13 above. Secondly, three decisions, *Re Australian Hotel*[34], *Re Lombe*[35] and *Re Watch Works*[36], have held that where the companies are in liquidation a chose in action constituted by a bank account which represents the surplus funds/moneys from the sale of a business, a scheme or an undertaking is not "*particular property*" within s579E(1)(b)(iv). If a chose in action represented by the proceeds from the sale of a business cannot be "*particular property*", by parity of reasoning the Alleged Chose must alsonot be "*particular property*" within s 579E(1)(b)(iv). Thirdly, if, contrary to the above, the Alleged Chose is "*particular property*", it was not "*particular property*" which *"is or was used or for use*" in connection with a business, a scheme or an undertaking carried on jointly by the companies sought to be pooled. Whilst the "*particular property*", which is or was used or for use might be satisfied, depending upon the facts, *"simply by holding it, where the mere holding can be regarded as the source of some advantage*"[37], such mere holding must occur *"in connection with a business, a scheme or an undertaking carried on jointly"*. That did not occur on the facts of this proceeding for the reasons set out in paragraphs 11 to 13 above and paragraphs 20, 21, 24 and 25 below.

15. The Alleged Chose came into existence, if at all, after the Printing Business Sale by which time both SAP and SAM were in liquidation. Such mere unappreciated passive existence of the Alleged Chose involved no act or conduct whereby the Alleged Chose was used as a source of advantage in carrying on jointly the Printing Business. This is completely different from those cases which have held that a mere holding

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[34] *Re Australian Hotel Acquisition (in liq)* [2011] NSWSC 1374 at [44] (Windeyer AJ): surplus funds/moneys from the sale proceeds of assets used in the business, scheme or undertaking "*are not particular property within (iv). As I have said if there were any particular property it no longer exists.*"

[35] (a) *Re Lombe* (2011) 87 ACSR 84 at [46] (Barrett J). Barrett J stated that Windeyer AJ's construction in *Australian Hotel* "*is, in my respectful opinion, correct*".

(b) Further, Barrett J held that the surplus funds/moneys remaining under the control of the liquidator after the sale of the retail businesses and satisfaction of the secured creditor's debt was not "*particular property*" which is owned: *Re Lombe* (2011) 87 ACSR 84 at [36]-[41] (Barrett J).

(c) In Barrett J's words "*An immediate problem here is that the whole of the business of each company has been sold*": *Re Lombe* (2011) 87 ACSR 84 at [37] (Barrett J).

[36] (a) *Re Watch Works* [2020] WASC 6 at [42] Vaughan J accepted the correctness of *Re Australian Hotel Acquisition (in liq)* [2011] NSWSC 1374 (Windeyer AJ) and *Re Lombe* (Barrett J).

[37] *Re Lombe* (2011) 87 ACSR 84 at [61] (Barrett J).

could be a source of advantage in connection with the carrying on jointly of a business, a scheme or an undertaking. [38]

Upon its deregistration SAM ceased to exist

16. Then, immediately upon SAM's deregistration, on 10 June 2018, the following events occurred: SAM ceased to exist (s601AD(1)); all SAM's property vested in the Second Respondent, namely ASIC (s601AD(2)) [39]; ASIC took only the same property rights that SAM itself had in the Alleged Chose (s601AD(3))[40]; if SAM held property subject to another interest, ASIC took the property subject to that interest

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[38] (a) *Re Lombe* (2011) 87 ACSR 84 at [19], [29], [50]-[54], [63] and [64] (Barrett J): the rights (choses in action) under cross-guarantees (each group company had against each other group company), where such cross guarantees were entered into by a group of companies to obtain the benefit of an ASIC class order relieving each group company from preparing separate financial statements.

(b) *Re Watch Works* [2020] WASC 6 at [66] (Vaughan J): a chose in action referable to cash deposited in a bank, as back to back security, so that a financial institution will provide a going concern company with a bank guarantee to fulfil a contractual commitment as part of the company's ongoing business operations (pre liquidation).

(c) *Re Lombe* (2011) 87 ACSR 84 at [58]-[59] (Barrett J): debts (choses in action) in a going concern factoring business or mercantile agency, business, undertaking or scheme.

(d) *Re Watch Works* [2020] WASC 6 at [10(4)], [13], [15]-[20], [52]-[54], [64] and [67] to [73] (Vaughan J): the chose in action referable to moneys in the bank account of one of the companies in liquidation where the liquidators of the companies in liquidation used or had those moneys for use to trade on the business carried on by those companies until the sale of that business by the liquidators and also to fund liquidation costs.

(e) *Newcastle City Council v Royal Newcastle Hospital* (1959) 100 CLR 1 at 4; [1959] AC 248 at 255, referred to in *Re Lombe* (2011) 87 ACSR 84 at [60] (Barrett J): vacant land owned by a hospital adjacent to the hospital's convalescent facility was "*used by the hospital … for the purposes thereof*" as that vacant land provided quiet and serene surroundings conducive to the recovery and rehabilitation of the convalescent patients.

[39] (a) Section 25(1) of the *Conveyancing Act 1919 (NSW)* empowered each of SAP and SAM, as a body corporate, to acquire and hold any property in joint tenancy in the same manner as if it were an individual. *"Property"* is defined in section 7(1) of the *Conveyancing 1919 (NSW)* to include a thing (a chose) in action.

(b) It appears, but was not decided by the primary judge or the FCAFC, that any joint ownership of SAP and SAM in the Alleged Chose was as joint tenants. . It is difficult to envisage how a right to sue could be held as tenants in common with each joint owner having separate and divisible interests in the right to sue. "*At law, there is no tenancy in common in respect of a chose in action*": *Re Kevin McNamara & Son P/L* (2014) 287 FLR 96 at [57] (Robson J); *Re McKerrell; McKerrell v Gowans* [1912] Ch 648; *De Lorenzo v De Lorenzo* [2020] NSWCA 351 at [21]-[25] (Leeming JA and White JA) at [62]-[70]; *McNamee v Martin as Financial Manager for John Boden McNamee* [2021] NSWSC 568 at [3] (Sackar J); *Helmore's Commercial Law and Personal Property in New South Wales* (10th ed, Lawbook Co 1992) by Carter, Lane, Tolhurst and Peden at p61

(c) Section 25(2) of the *Conveyancing Act 1919 (NSW)* provided that where a body corporate is a joint tenant of any property, then on its dissolution the property shall devolve to the other joint tenant.

(d) SAM's deregistration constituted SAM's dissolution. If s25(2) operated, and SAM held its interest in the Alleged Chose as a joint tenant at that time, SAM's joint tenant interest in the Alleged Chose devolved to SAP, the other joint tenant, on SAM's deregistration. This was not the subject of consideration by the Courts below.

(e) An issue of the interplay between s601AD(2) and (3) of the *Act* and s25(2) *Conveyancing Act 1919 (NSW)* may arise. That has to be considered in the context of s5E(1) of the *Act* which provides *"The Corporations legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory."*

[40] See Footnote 39 above.

(s601AD(3)); ASIC had all the powers of an owner of property vested in ASIC under s601AD(2) (s601AD(4)); if SAM had joint ownership of the Alleged Chose with SAP at the time of its deregistration[41], SAM's interest in the Alleged Chose with SAP vested in ASIC and ASIC had all the powers as a joint owner, with SAP, of the Alleged Chose; ASIC could dispose of or deal with its joint interest in the Alleged Chose as it saw fit (s601AE(2)(a)), subject to SAP's rights as a joint owner of the Alleged Chose[42]; ASIC had to keep a record of any dealings with its joint interest in the Alleged Chose and accounts of all moneys received from those dealings (s601AE(5)(b) and (c)). That is, on the assumption the Alleged Chose could be used or for use in carrying on a business, a scheme or an undertaking (which the First Respondent contends is wrong) then, ASIC, not SAM, had the legal capacity to carry this on from SAM's deregistration to SAM's reinstatement and appointment of a new SAM Liquidator. There is no evidence that ASIC carried on anything in relation to the Alleged Chose, whether on its own or jointly with SAP, whilst SAM ceased to exist from 10 June 2018 to 2 December 2021. The fact that, upon its reinstatement, SAM is taken to have continued in existence as if it had not been deregistered (section 601AH(5)) did not retrospectively alter the above legal states of affairs. Beach J accurately summarised this evidence and held at **FC [147] (CAB 73-74)** that SAM had ceased trading three years before its liquidation, did nothing during the liquidation and did not recover any debts prior to its deregistration.

17. To seek to overcome these difficulties, the Appellants at *AS* at [19], adopt the finding of Markovic J in dissent that: *"the business ...carried on jointly ... did not necessarily cease upon the sale ... its nature changed from one of actively carrying on a business to one of recovery and payment of debts"* (**FC [242]** at **CAB 98)**.

18. This proceeding is not concerned with collecting in debts from customers of a business once that business has ceased actively trading, which is what the bankruptcy cases Markovic J referred to and applied were concerned with. Once in insolvency administration, SAP and SAM did not collect in their trade debtors. The trade debtors of the Printing Business were collected by Scottish Pacific, who had factored these trade debtors, under a separate receivership, to effect repayment to Scottish Pacific of what was owing to it by SAP and SAM.[43] Within the language of the bankruptcy

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[41] See Footnote 39 above.
[42] See Footnote 39 above.
[43] **FC [120] (CAB 69-70)**.

cases relied on by Markovic J, and by the Appellants, SAP and SAM were not carrying on any business of recovering moneys owed by their trade debtors where the Printing Business had ceased active trading.

19. Markovic J did not identify the evidence to support her conclusion that upon the Printing Business Sale, the Printing Business' nature changed from one of actively carrying on a business to one of recovery and payment of debts (apart from the fact that this is an incorrect legal categorisation of alleged non-receipt of part of the purchase price). There is simply no evidence, and the Appellants proffer none in the *AS*, to support this finding of Markovic J in dissent (and its adoption by the Appellants in the *AS* [19]). Also, Markovic J did not deal with the positive facts to the opposite conclusion found by Yates J (**FC [72]-[75]** at **CAB 60)**) and Beach J (**FC [147]** at **CAB 73-74)** or the legal issues which underpinned their findings.

20. Yates J correctly found that there is no evidence that, after the sale of the Printing Business, SAP and SAM, in fact, were jointly carrying on the activity of recovering debts and other assets of the Printing Business and that any assertion that SAP and SAM could have carried on jointly the activity of recovering debts and such assets did not fill this evidential gap (**FC [72] and [74] (CAB 60**).

21. The Appellants' attempt to undo Yates J's factual finding of lack of evidence is flawed. At *AS* [23], the Appellants contend that *"by the very proceedings which were before the primary judge, that is precisely the outcome which was being sought (and by the time of the appeal the recovery proceedings had been commenced)"*. This takes the matter nowhere. As Beach J correctly held: *"it is impermissible to have regard to what will happen if a pooling order is made in determining whether there is jurisdiction to make a pooling order"* (**FC [146]** at **CAB 73**). The Appellants, in the *AS*, fail to address Beach J's factual findings (**FC [147]** at **CAB 73-74**), that there was no evidence to support any finding of the alleged joint undertaking.

22. Further, contrary to the Appellants' submission, the proceeding before the primary judge was not and could not be legally characterized as: (a) a proceeding for recovery of any assets by SAP and/or SAM; (b) a business, a scheme or an undertaking carried on jointly by SAP and SAM. The proceeding before the primary judge was a reinstatement order and pooling order proceeding brought by SAP and the SAP Liquidator. SAM did not exist, and SAM's interest in the joint Alleged Chose did not revest from ASIC to SAM, until final orders were made in that proceeding. These

matters proffered by the Appellants cannot be evidence to rebut Yates J's finding of want of proof at **FC [74] (CAB 60)**.

23. Beach J was correct in stating that absent pooling, any proceedings brought by the SAP and SAM Liquidators to recover money under the Alleged Chose would not be regarded as an undertaking carried on jointly as the funds recovered would need to be applied in the separate liquidations of SAP and SAM (**FC [149]** at **CAB (74)**).Yates J also correctly found (**FC [70]** at **CAB 34**) that the joint undertaking to which the primary judge referred at **PJ [97] (CAB 34**), and which the Appellants adopted before the FCAFC, was not a past or present undertaking by SAP and SAM, but a *future* joint undertaking by them once the pooling order was made. However, the s579E(1)(b)(iv) inquiry into is or was used or for use directs attention to both the present and the past,[44] not to the future. Future use, which, in substance, is what the Appellants rely upon, is not a gateway permitted by s 579E(1)(b)(iv).

24. In addition, Markovic J's dissentient finding is based upon her Honour's erroneous adoption (**FC [243]-[244] CAB 98-99**) of the case law meaning given to the phrase *"carrying on business in Australia"* in different legislation, namely s43(1)(b)(iii) *Bankruptcy Act*. Markovic J's explanation that *"Although the phrase used in s579E(1)(b)(iv) of the Corps Act is slightly different I see no reason why the term as understood in the context of the Bankruptcy Act would not be equally applied to a company being wound up pursuant to the provisions of the Corps Act"* (**FCA [244] CAB 99**) contained no substantive process of reasoning. The meaning of carried on in connection with a business, scheme or undertaking in section 579E(1)(b)(iv) is not to be fixed by consideration of cases applying to section 43(1)(b)(iii) of the *Bankruptcy Act 1966 (Cth)*[45] or the UK equivalent. Markovic J failed to apply the cautionary note of Gibbs J made in considering the expression carrying on business in this bankruptcy context: *"The expression "carrying on business" may have different meanings in different contexts. "*[46] and that of *"carrying on"* being the *"repetition of acts ...and activities which possess something of a permanent character"*[47] /*"the doing of a succession of acts designed to advance"*[48]. Thus,

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[44] *Re Lombe* (2011) 87 ACSR 84 at [40] (Barrett J).
[45] (a) *Re Mendonca (a debtor), Re; Ex parte Federal Commissioner of Taxation* (1969) 15 FLR 256 at 261; (1970) ALR 337 at 357 (Gibbs J).
(b) *Re Vassis; Ex parte Leung* (1986) 9 FCR 518 at 525-526; (1986) 64 ALR 407.
[46] *Luckins v Highway Motel (Carnarvon)Pty Ltd* (1975) 133 CLR 164 at [10], 178 (Gibbs J).
[47] *Hope v Bathurst City Council* [1980] HCA 6; (1980) 144 CLR 1 (Mason J) at 8-9.
[48] *Luckins v Highway Motel (Carnarvon)Pty Ltd*(1975) 133 CLR 164 at [10], 178 (Gibbs J).

"Participation in a single transaction or a number of isolated transactions will not satisfy this aspect [of *"carrying on"*][49].

Upon SAM's reinstatement, s601AH(5) provided a limited measure of retrospectivity

25. The Appellants, at *AS* [35], adopt Markovic J's, in dissent, finding (**FC [248]** at **CAB 100** that, at the time of the making of the pooling order, SAM was taken to have continued its joint undertaking with SAP of getting in and paying debts. Markovic J's finding is legally incorrect for a number of reasons. For the reasons set out in paragraphs 9 to 16 and 20 to 24 above, prior to SAM's deregistration, there was no relevant business, scheme or undertaking carried on jointly by SAP and SAM in connection with which the Alleged Chose is or was used or for use in.

26. Markovic J misapplied, and the Appellants misapply, the legal effect of s601AH(5). This section does not have the effect that SAM was taken to have continued its joint business or undertaking with SAP of getting in and paying its debts. The Appellants are incorrect in submitting that immediately upon SAM's reinstatement any alleged business, scheme or undertaking of SAP and SAM in relation to the Alleged Chose was then "*carried on*".

27. Immediately upon SAM's reinstatement, the following events occurred. Firstly, SAM *"is taken to have continued in existence as if it had not been deregistered* [on 10 June 2018]": s601AH(5)[50]. That is, from 10 June 2018 to 2 December 2021, SAP is taken to have continued in a creditors voluntary winding, up being SAM's legal status when deregistered[51]. The *"effect of the first sentence of that subsection* [s601AH(5)] *...may be merely to preserve the identity of the company as the same legal personality as that which was previously resuscitated."*[52] Secondly, any interest of SAM as a joint owner (with SAP) of the Alleged Chose which had vested

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[49] *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548 at [52] (the Court).
[50] *Re ERB International Pty Ltd (deregistered)* (2014) 98 ACSR 124 at [40] (Brereton J): *"The effect of reinstatement is that the company is taken to have continued in existence as if it had not been deregistered, not that it comes back into existence in the same form. However, upon the reinstatement of a company that was at the time of deregistration in liquidation, it remains in liquidation unless the court otherwise orders. Under s 601AH(3)(b), the court can, when ordering reinstatement, reappoint the former liquidator, or appoint a new liquidator "; ACN 078272867 Ply Ltd (In Liq) v Deputy Commissioner of Taxation* (2011) 86 ALJR 4 at [41] (Heydon J).
[51] *Naaman v Sleiman* [2015] NSWCA 259 at [88], and the cited cases, (Gleeson JA (which whom Meagher and Ward JJA agreed)).
[52] *Foxman v Credex National Australian Trade Exchange Pty Lid (in liq)* (2007) 215 FLR 392 at [65] (White J). See also: *Allianz Australia Ltd v Viksne* (2021) 106 NSWLR 306 at [58] (White J).

in ASIC upon SAM's deregistration (s601AD(2))[53], thereupon, but not retrospectively, revested from ASIC to SAM (s601AH(5)): *"section 601AH(5) provides only a limited measure of retrospectivity concerning title to property of the company, so that the property revests in it only from the time of reinstatement"* [54] and *"As s601AH(5) itself recognises, the past can only partly be undone"*[55]. Thirdly, SAM's *"reinstatement does not mean that it continued, by some fictional means, to carry on a business which in fact was not being carried on"*[56]. Fourthly, a new liquidator was appointed to SAM, such appointment to commence from the date of this new appointment, not retrospectively– the previous liquidator was not automatically reappointed: s601AH(3)(d)[57]. Whilst deregistered, SAM had no liquidator[58] or director[59] in control of SAM's affairs to enable SAM to have carried on a business, a scheme or an undertaking with SAP and SAM's reregistration did not retrospectively effect such appointments to the date of deregistration.

28. The Appellants at *AS* [31] quote a passage in *Allianz Australia Insurance Ltd v Viksne* (2021) 106 NSWLR 306 at [34] that s601AH(5) *"by its use of the expression "is taken to have', deems the reinstated company to have "continued in existence", contrary to the fact. It thereby creates a statutory fiction. ...to be applied when relevant in determining rights or liabilities defined by reference to past events"* (underline added). This passage is not authority for, and simply does not state or encapsulate, the bold, and legally incorrect, proposition at *AS* [34] that: *"By operation of s601AH(5), the relevant cause of action was deemed to have remained an asset of, and for use of, SAM during the period it was deregistered"*. *Allianz v Viksne* concerned whether reinstatement of a deregistered company would validate a

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[53] See Footnote 39 above.
[54] *White v Baycorp Advantage Business Information Services Ltd* (2006) 200 FLR 125 at [115], [123] (Campbell J); *CGU Workers Compensation (NSW) Ltd v Rockwall Interiors P/*L (2006) 201 FLR 296 at [17] (Barrett J); *GIO General v Sabko* (2007) 70 NSWLR 743 at [11] (Austin J); *Foxman v Credex National Australian Trade Exchange Pty Lid (in liq)* (2007) 215 FLR 392 at [42], [61], [62] (White J).
[55] *Mitzev v Foxman* [2007] NSWCA 273 at [25] (Basten JA (with whom Tobias and McColl JJA agreed)).
[56] *Mitzev v Foxman* [2007] NSWCA 273 at [25] and the cited cases (Basten JA (with whom Tobias and McColl JJA agreed)).
[57] *Ramantanis v G&M Excavations* (2004) 22 ACLC 22 at [7]-[8] (Barrett J); *Donmastiy Pty Ltd v* Albarran (2004) 49 ACSR 745 at [14]-[15] (Barrett J); *JP Morgan Portfolio Services Ltd v Deloitte Touche Tohmatsu* [2008] FCA 433 at [8]-[10] (Stone J); *Naaman v Sleiman* [2015] NSWCA 259 at [86] (Gleeson JA (with whom Meagher and Ward JJA agreed)): *"The power to appoint a liquidator arises under s601AH(3)(d), which enables the Court to make an" other order it considers appropriate"* and the cases there cited.
[58] See Footnotes 50 and 57 above and 59 below.
[59] Section 601AH(5) states: *"If a company is reinstated,...A person who was a director immediately before deregistration becomes a director again from the time when ASIC or the Court reinstates the company."* There is no director of the company whilst deregistered and the appointment of the director is not retrospective.

proceeding commenced against the company when it was deregistered. *Allianz v* Viksne does not hold or even suggest that s601AH(5) retrospectively revests an asset (here the Alleged Chose) in the deregistered company upon its reregistration. To do so would be contrary to: (a) the express language (to the opposite effect) of s601AD(2), which states *"On deregistration, all the company's property…vests in ASIC"*; (b) the third sentence of s601AH(5), which states "*Any property of the company that is still vested in the Commonwealth or ASIC revests in the company*"; and (c) the cases referred to in Footnotes 54 and 55.

29. Beach J correctly made the factual finding (**FC [153]** at **CAB 75)** that, immediately upon SAM's reinstatement, SAP and SAM did not jointly carry on *"a business, scheme or undertaking … in relation to the alleged chose in action"*. Beach J was correct in stating that s601AH(5) did not deem SAM to have carried on a business, scheme or undertaking jointly with SAP when SAM was deregistered and the Alleged Chose was vested in ASIC, and when SAM did not have a liquidator (**FC [152]** (**CAB 75**) **–** see also paragraphs 27 and 28 above as they applied to SAM and its interest in the Alleged Chose. The *AS* at [31] to [34] are plainly wrong.

30. The making of the SAM reinstatement order, the order appointing a SAM Liquidator and lastly the making of the pooling order occurred one after the other and were separated, if at all, by a legal instant. In that legal instant it was not possible for *"a business, a scheme or an undertaking"* "*carried on jointly by*" SAP and SAM to have occurred so as to satisfy the requirement of section 579E(1)(b)(iv). Carrying on a business, scheme or undertaking connotes acts of a repetitive nature.[60] Section 601AH(5) does not, and cannot, deem such acts to have been occurring for the 3.5 years SAM was deregistered (did not exist).

31. Subsequent to SAM's reinstatement and appointment of the SAM Liquidator there was never a time when SAM, by its newly appointed Liquidator, somehow carried on a business, a scheme or an undertaking jointly with SAP. Beach J correctly made this factual finding **(FC [153] CAB 75)** and held that carrying on a business, scheme

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[60] (a) *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1 at 8 (Mason J):
"It is the words "carrying on" which imply the repetition of acts … and activities which possess something of a permanent character."
(b) Applied in *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548 at [52**]**. After adopting the test of Mason J in *Hope v Bathurst City Council*, the Full Federal Court stated:
"Participation in a single transaction or a number of isolated transactions will not satisfy this aspect [of "carrying on"]."
(c) *Donoghue v Russells (A Firm)* [2021] FCA 798 at [38]-[51] (Rangiah J).

or undertaking connotes acts of a repetitive nature which could not occur between the legal instant between the making of the order for the reinstatement of SAM and the making of the pooling order.

The FC's judgment does not mean that a pooling order cannot be made where one of the companies has been deregistered

32. Further, the Appellants overstate the matter at *AS* [29] when they say: "*If the reasoning of the majority were accepted, then it would follow that a liquidator could never pool companies where one of the companies to be pooled was required to be reinstated, as the effect of the reasons of the majority were that any joint business, scheme or undertaking was severed, and the deeming provisions in section 601AH(5) of the Act are ignored"*. This is not a fair reading of the reasons of Yates J and Beach J. Their Honours correctly applied the legal effect of s601AH(5) to the actual facts as found, including that the Appellants brought a "simultaneous" reinstatement and pooling application in the one proceeding. Their Honours neither made nor suggested that pooling orders could not be made where one of the companies had to first be reinstated. An obvious example is where a piece of valuable equipment (**Valuable Tangible Asset**) of a deregistered Company A is discovered after deregistration. During Company A's deregistration ownership of the Valuable Tangible Asset vested in ASIC. Company A is reinstated but is insolvent so Company A is placed into liquidation upon reinstatement. Upon Company A's reinstatement, ownership of that Valuable Tangible Asset revests from ASIC to Company A. Before deregistration, that Valuable Tangible Asset was used by Company A in connection with a business carried on jointly by Company A with another Company B which was also placed into liquidation after their joint business failed. Upon Company A's reinstatement, a pooling application of Company A and Company B is made. Section 579E(1)(b)(iv) is satisfied as: (a) at the time of the pooling order application Company A owns the Valuable Tangible Asset; (b) the Valuable Tangible Asset was used in connection with a business carried on jointly by Company A and Company B before they both went into liquidation and before Company A was deregistered.

33. The circumstance that there is a case (*Hathway, in the matter of Stacey Apartments (in liq) v Southern Cross Estate Developers P/L (deregistered)* [2019] FCA 1218) where "simultaneous" reinstatement and pooling orders were made in the one proceeding, determined on its own facts, does not and cannot mean that Yates J and

Beach J fell into error in applying s 601AH(5) to completely different facts. In *Hathway* the particular property was real property of one of the companies (not the deregistered company which was reinstated) which was used in connection with a business, undertaking or scheme relating to property development and associated activities previously carried on jointly by a group of companies, where, after this business ceased to be carried on, one of the companies which was now sought to be pooled was placed into insolvency administration and subsequently deregistered. It was sought to reregister this company, have a liquidator appointed and then a pooling order made in respect of the group of companies in the one proceeding at the same time, which occurred. Insofar as the pooling jurisdiction gateway was concerned, the facts in *Hathway* were materially different to those in the present proceeding. In *Hathway*, the particular property relied on was real estate used by one of the other group companies to secure a group financing facility. The property development business in which this real property was used was carried on jointly by the group of companies prior to their insolvency administrations. *Hathway*, like the example of the Valuable Tangible Asset proffered in paragraph 32 above, are examples of the types of circumstances where the section 579E(1)(b)(iv) pooling gateway provision may be enlivened where one of the companies sought to be pooled has been deregistered. This, of course, leaves to one side the range of circumstances in which a deregistered insolvent company may be reregistered and be pooled by satisfying one or more of the other three jurisdictional gateway provisions in sections 579E(1)(b)(i) to (iii).

SAM Liquidator should have been (but was not) an applicant for the pooling order

34. None of the factual issues in the present proceeding arose for consideration in *Hathway*[61]. SAP, the SAP Liquidator and the former SAM Liquidator made a deliberate choice to disregard the structure and intendment of a pooling application, namely that all companies in liquidation sought to be pooled and their liquidators be the plaintiffs[62]. Instead, SAP and the SAP Liquidator chose to combine in the one proceeding, the application for the SAM reinstatement, the appointment of a SAM Liquidator and the application for the pooling order. There was a mere legal moment in time between the reinstatement of SAM, which had ceased to exist for 3.5 years

[61] *Hathway, in the matter of Stacey Apartments (in liq) v Southern Cross Estate Developers P/L (deregistered)* [2019] FCA 1218 at [23] (Jagot J).
[62] See footnote 64 below.

(moment 1), to the appointment of the new SAM Liquidator (moment 2) and then to the pooling order (moment 3). Neither *Hathway* nor the primary judge in this proceeding grappled with the issues (statutory precondition[63], standing[64] and statutory notice[65]) which arise when the pooling order is sought in the same proceeding and at the same time as the reinstatement of one of the companies to be pooled and appointment of a liquidator to that company. The jurisdictional gateway question in section s579E(1)(b)(iv) had to be considered in this context.

Part VI: Not Applicable as there is no notice of contention or cross-appeal.

Part VII: The First Respondent estimates about 1½ hour for its oral argument.

Dated: 1 December 2023

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[63] SAM had to both exist and be in the legal state where SAM *"is being wound up"* when the pooling order was made: s579E(1)(a). That state of legal affairs occurred for an legal instant in time.

[64] The only person(s) to have standing to make an application for pooling is/are: *"the liquidator or liquidators of the companies in the group*":s579E(11). This means the liquidator or liquidators of each of the companies in the group, not just of one of the companies: *Allen v Feather Products Pty Ltd* (2008) 72 NSWLR 597 at [10] (Barrett J): *"Section 597E(11) says that a pooling order may only be made on the application of the liquidators of* ***all*** *the companies affected."*(bold added). Accordingly, when the originating process was filed and at all times up until, and if and when, an order is made reinstating SAM and a SAM liquidator is appointed, there will be no person(s) with standing to make a pooling order application in relation to SAM as a "*company in the group*". Further, the SAM Liquidator was never an applicant even after appointed after SAM was reinstated. These are substantive, not procedural, matters.

[65] Section 579J(1) (notice of the pooling application to each eligible unsecured creditor of each company) must be complied with in a sufficient time in advance of the hearing of the pooling application as each eligible unsecured credit (defined in s579Q(1)) has a right to appear and be heard on the pooling application: *Walker, In the matter of ZYX Learning Centres Limited (formerly A.B.C. Learning Centres Limited) (Receivers and Managers Appointed) (in liq)* [2015] FCA 146 at [24]-[25] (Jagot J). The issuing of a notice under s579J(1) by the person who has legal capacity to do so relates to substantive, not procedural, rights, as the court is precluded from making a pooling order if it is satisfied that order would materially disadvantage an eligible unsecured creditor of a company in the group and that creditor has not so consented: s579E(10); *Re Lombe* (2011) 87 ACSR 84 at [82] (Barrett J); *In the matter of Aboriginal Connections* (2012) 263 FLR 121 at [39] (Barrett J); *Lofthouse v Environmental Consultants International Pty Ltd (in liq)* [2012] VSC 416 at [30] (Ferguson J); *Hutson (liquidator), in the matter of WDS Limited (in liq) (Receivers and Managers Appointed)* [2020] FCA 299 at [61], [62], [97]-[101], [109], [110] and [112] (Markovic J); *Re Watch Works* [2020] WASC 6 at [80]-[81] (Vaughan J).

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **JOHN MAXWELL MORGAN**
First Appellant

SYDNEY ALLEN PRINTERS PTY LTD (IN LIQUIDATION)
Second Appellant

SYDNEY ALLEN MANUFACTURING PTY LTD (IN LIQUIDATION)
Third Appellant

and

MCMILLAN INVESTMENT HOLDINGS PTY LTD
First Respondent

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Second Respondent

ANNEXURE TO THE FIRST RESPONDENT'S SUBMISSIONS

Pursuant to Practice Directions No. 1 of 2019, the First Respondent sets out below a list of statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
1.	*Corporations Act 2001* (Cth)	12 November 2021	Sections 5E, 9 (definition of "*property*"), 180(1), 420A, 436A, 439C, 446A, 477, 491, 493, 499, 579E, 579J, 579Q, 601AD, 601AE, 601AH
2.	*Conveyancing Act 1919* (NSW)	1 July 2017	Sections 7 (definition of "*property*"), 25
3.	*Bankruptcy Act 1966* (Cth)	15 September 2021	Section 43