



## HIGH COURT OF AUSTRALIA

8 February 2023

BRYANT & ORS v BADENOCH INTEGRATED LOGGING PTY LTD  
[2023] HCA 2

Today, the High Court unanimously dismissed an appeal and cross-appeal from a decision of the Full Court of the Federal Court of Australia. The case concerned the operation of voidable transactions in insolvency governed by Pt 5.7B of the *Corporations Act 2001* (Cth). Within Pt 5.7B, s 588FA(3) is a statutory embodiment of the "running account principle". The effect of s 588FA(3) is that if "a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account)" between a company as debtor and a creditor, then all transactions forming part of that relationship are to be treated as if they together constituted a single transaction in determining if the transaction is an unfair preference given by the company to the creditor, voidable on application by a liquidator.

The appellants were the liquidators of a company ("Gunns"). The respondent ("Badenoch") entered into an agreement to supply services to Gunns for harvesting and hauling timber. From 2010, Gunns suffered significant declines in revenue. Badenoch continued to provide services to Gunns, despite Gunns frequently being late in making payments or only making partial payments. In August 2012, Badenoch agreed with Gunns to terminate the agreement on the basis that it would continue to supply some services for a further short period. On 25 September 2012, Gunns appointed liquidators. The liquidators applied under s 588FF(1) to have a series of payments made by Gunns to Badenoch within the six-month period ending on 25 September 2012 declared to be voidable transactions on the basis that they were unfair preferences. The liquidators contended that, if there was a "continuing business relationship" so as to engage s 588FA(3), they were entitled by the "peak indebtedness rule" to choose the starting date within that six-month period to prove the existence of an unfair preference given by Gunns to Badenoch.

The primary judge held that the "peak indebtedness rule" applied under s 588FA(3). The primary judge also held that only two of the payments (3 and 4) were made as an integral part of a continuing business relationship involving a running account; and the remaining payments (1 and 2 and 5 to 11) were not. On appeal, the Full Court held that the "peak indebtedness rule" did not apply under s 588FA(3), and that payments 1 and 2 were also part of the relationship.

The High Court dismissed the appeal. The Court held that Pt 5.7B of the *Corporations Act* does not incorporate the "peak indebtedness rule". Further, whether a "transaction is, for commercial purposes, an integral part of a continuing business relationship" under s 588FA(3)(a) involves an objective factual inquiry as to the "business character" of the relevant transaction. On that basis, payments 1 and 2 formed part of the continuing business relationship, but payments 5 to 11 (which occurred after the continuing business relationship had ceased in August 2012) did not. To be an unfair preference, the deemed single transaction under s 588FA(3) – being all of the transactions forming part of the relationship during the relevant period – was required to reduce the indebtedness of Gunns to Badenoch over that period. Because the net indebtedness of Gunns to Badenoch increased over the relevant period, there could be no unfair preference.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*