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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00129860

TITLE OF PROCEEDINGS

First Appellant	Sweta Prashant Changela
Second Appellant	Prashant Girishbai Changela
Number of Appellants	3
First Respondent	Dracoma Pty Ltd

FILING DETAILS

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ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Respondent's Outline 14.07.2025.pdf)

[attach.]

Supreme Court of New South Wales
Court of Appeal

Case No. 2025/00129860

Sweta Prashant Changela & Ors
Appellants

Dracoma Pty Ltd
Respondent

RESPONDENT'S OUTLINE OF SUBMISSIONS

A. INTRODUCTION

1. The appeal is confined to the primary judge's decision in relation to the two payments of $250,000 made by Changela Exports Pty Ltd (in liquidation) (**Company**) on 20 September 2017; one to the first and second appellants and the other to the third appellant (**$250K Payments**).

2. The second and third appellants were de facto directors of the Company. The primary judge found that the $250K Payments were unreasonable director related transactions within the meaning of s 588FDA of the *Corporations Act 2001* (Cth) (**Act**).

3. As set out below, the findings in relation to the $250K Payments were clearly available on the objective evidence that was before the Court. Notably, the defendants led no evidence to explain or justify the $250K Payments or for that matter, any of the payments that were sought to be impugned in the proceedings.

4. While the $250K Payments comprised a repayment of funds earlier advanced to the Company by its de facto directors, there was no commercial rationale or legal obligation for the repayments to have been made when they were. The $250K Payments were made in circumstances where the Company was on the verge of embarking upon a significant and risky stock purchase in volatile market conditions and the funds were critically necessary for that purpose. Removing the funds in September 2017 left the Company both vulnerable and exposed such that, for the purpose of s 588FDA(1)(c), a reasonable person in the Company's circumstances would not have permitted the transactions to occur.

B. BACKGROUND FACTS

5. The specific background facts and reasoning relevant to the $250K Payments are contained at [230] to [240] of the reasons for judgment below delivered on 21 February

2025 (**J**),[1] although other background facts arising from the evidence and referred to in the reasons for judgment provide context. A brief overview of these facts is as follows.

6. The Company was in the business of exporting chickpeas from Australia to India. Dracoma Pty Ltd (the respondent) (**Dracoma**) claimed to be a major trade creditor of the Company arising from the sale of a chickpea harvest in 2017.[2] Alexander Wheeler was the director and shareholder of Dracoma, being a crop farmer for the last 50 years.[3]

7. Dracoma's claims in the proceedings were the subject of an assignment by the liquidator of the Company pursuant to a Deed of Assignment dated 1 September 2022.[4] The claims were claims that would ordinarily be pursued by a company's liquidator and primarily comprised claims to impugn transactions of the Company made to its directors in the period leading to its voluntary liquidation which occurred on 23 December 2020.[5]

8. While Radhika Changela and Sweta Changela (the first appellant) were formally recorded as the Company's directors, the persons who were centrally involved in the Company's business were Dr Vijay Pandya (**Dr Pandya**), Prashant Changela (the second appellant) and to a lesser extent, Rajan Changela.[6] The primary judge found the wives of Prashant and Rajan Changela to be "nominees or proxies" for their husbands.[7]

9. Prashant and Rajan Changela were brothers and the husbands of Sweta Changela and Radhika Changela respectively.[8] Dr Pandya was the Changela family's doctor (and also Mr Wheeler's doctor of many years) and the controller of Vijay Pandya Pty Ltd (the third appellant).[9]

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[1] Red Book 101H-103H
[2] J [23]; Red Book 66H
[3] J [1]-[2]; Red Book 63U-X
[4] J [20]-[21]; Red Book 65N-66E
[5] J [19]; Red Book 65L-M
[6] J [37]; [128]-[133]; Red Book 70P-R; 85O-86K
[7] J [37]; Red Book 70R
[8] J [9]-[10]; Red Book 64Q-S
[9] J [20]; [197]; Red Book 65U; 95R-T

10. Prashant Changela (**Prashant**) admitted to being a de facto director of the Company from the outset.[10] During the course of his cross-examination, the issue of Dr Pandya's de facto directorship was conceded.[11]

11. The Company had no formal governance or financial systems.[12] In relation to the latter, the Company's accounting records were maintained on a MYOB program which was inputted on an ad hoc basis by Rajan Changela "as and when he had time to do so".[13]

12. The Company's trading life was short-lived, it having commenced at some point in 2016 and ending in late January 2018.[14] Given that a number of the transactions the subject of Dracoma's claims (excluding the $250K Payments) were alleged to have been insolvent transactions within the meaning of s 588FC of the Act, the question of insolvency was an issue for determination. The primary judge found the Company to be insolvent "by no later than 31 December 2017" primarily by reason of its entry into a second purchase agreement with Dracoma at that time for the purchase of its 2017 crop, being a transaction that it was unable to complete.[15]

13. The first trading transaction between the Company and Dracoma occurred in 2016 shortly after the Company commenced trading. At this time, Dracoma sold to the Company its 2016 crop of approximately 1,658 tonnes of chickpeas for $1,523,209.87.[16]

14. From time to time, the Changelas and Dr Pandya (through his company Vijay Pandya Pty Ltd) advanced funds to and received funds back from the Company.[17] There were no agreements in existence recording the terms of the arrangement such as a loan agreement. The only evidence in relation to the matter was given by Prashant where he suggested that a repayment of advanced funds would occur in circumstances where the Company no longer "required" the funds. Prashant gave the following evidence during the course of cross-examination:

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[10] J [39]; Red Book 70V

[11] T269.6; Black Book 162E; J [41]-[45]; Red Book 71E-W

[12] J [32]; Red Book 68S-V

[13] J [33]; Red Book 68W

[14] J [179]; Red Book 93R

[15] J [188]-[198]; Red Book 94Q-95V

[16] J [137]-[140]; Red Book 86R-X; Blue Book 5S

[17] J [27]-[28]; Red Book 67J-68L

HIS HONOUR

Q. When the moneys were advanced, was there any agreement at all about when they'd be returned?

A. Your Honour, no, there was no agreement. The only side was that whenever a company needed funds in order - if there was a short of cash full - cash flow, all the three people who normally used to put money, normally used to put money and when our company had enough cash or did not require, that used to be paid back time to time.

Q. So you're saying there was what, a conversation when these moneys were advanced that they would be repaid when the company didn't need the money?

A. That's correct. It was all verbal, so nothing was in written.

Q. You haven't mentioned that in any of your affidavits, have you?

A. I have mentioned it somewhere.[18]

15. Prashant also gave the following evidence in relation to the $250K Payments:

Q. There was no need to pay out the sum of $250,000 on 20 September 2017 from the company's perspective, that's correct, isn't it?

A. No, that's not correct.

Q. What was the need that the company had to repay on 20 September 2017 the two sums of $250,000?

A. Your Honour, that money was been given by those people and that was repaid when it was not required, as mentioned earlier.[19]

16. In months prior to the $250K Payments, it was common ground (at least on the pleaded case) that the appellants intended to purchase a second crop of chickpeas from Dracoma. In this respect, it was admitted in the Commercial List Response that by 22 July 2017, the Company "had the intention to purchase chickpeas from Dracoma" and that the purchase was "within the contemplation of Prashant and Dr Vijay".[20] Moreover, in cross-examination, Prashant accepted that the plan to acquire a further crop was in place in July 2017[21] and that further funds were needed to undertake the purchase.[22]

17. Throughout 2017, Prashant and Dr Pandya held concerns about the volatility of the chickpea market. In an email of 30 May 2017 to Dr Pandya, Prashant stated that the market in India was crashing and that their sources were reporting to "be very careful

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[18] T354.42-T355.8; Black Book 243U-244F

[19] T355.29-36; Black Book 244O-R

[20] Commercial List Response [7]; Red Book 49K-N; JS [231]; Red Book 101J

[21] T352.21; Black Book 241L

[22] T352.24; Black Book 241M

in dealing with chickpeas this year".[23] Further emails were exchanged throughout July 2017 with Prashant commenting "market gone real down real fast (sic)" and Dr Pandya stating in response "something strange is happening in India". [24]

18. In the days prior to the $250K Payments, in an email of 19 September 2017 to Dr Pandya, Prashant raised concerns about heavy losses being recorded on the chickpea trade index.[25] Prashant also gave evidence that by September 2017, he was aware of the fact that the Indian government would be imposing trade tariffs on any chickpeas imported into India.[26] The primary judge found that, by reason of the likelihood of tariffs being imposed, "the potential for difficulty in selling chickpeas in India" must have been known to Prashant.[27]

19. The circumstances prevailing in the lead up to the $250K Payments were described by the primary judge as follows:

> [232] From July 2017, Prashant was communicating with growers, including Mr Wheeler, about the possibility of purchasing chickpea stock. On 18 September 2017, two days before the impugned payments, Prashant and Dr Pandya exchanged emails concerning the relevant trade index and the price at which the Company could sell chickpeas into India.
>
> [233] According to the Company's balance sheet, as at FY17, it had total assets of $1,363,983, with total liabilities of $1,364,067, a slight deficiency.
>
> [234] The Company's assets included cash at bank in the sum of a little over $1 million.
>
> [235] The effect of the impugned transactions was that the Company had $500,000 less in liquid funds to devote to the purchase of the 2017 Crop.
>
> [236] There is no evidence that Prashant or Dr Pandya gave any consideration as to whether the payments would have a negative impact on creditors of the Company, nor that they considered the financial ramifications to the Company in making those payments. The effect of the payments was that the only means that would be available for the Company to pay for the likely cost of purchase of the 2017 Crop would be the proceeds of its sale.[28]

20. The primary judge concluded at [239]-[240], in relation to the $250K Payments:

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[23] Blue Book 103T

[24] Blue Book 57R-T

[25] Blue Book 119V-Y

[26] T327.45-50; Black Book 216V-X

[27] Red Book 102V-X

[28] Red Book 101M-102G

> [239] In those circumstances, I am persuaded that it might be expected that a reasonable person in the Company's circumstances, and in the circumstances in which Prashant and Dr Pandya found themselves, would not have caused these payments to be made but would, rather, have left those funds in the Company in preparation for its purchase of the 2017 Crop. Contrary to Prashant's evidence, the funds were "required" by the Company for that purpose.
>
> [240] I find that these payments were unreasonable director-related transactions.[29]

21. To complete the overview of the background, the negotiation of the sale transaction in respect of the 2017 crop between the Company and Dracoma occurred in October 2017.[30] While there was a dispute in the proceedings as to the terms of the transaction (whether a consignment or contract of sale), it was ultimately found that Dracoma had agreed to sell to the Company (with payment on delivery) approximately 2.5 thousand tonnes of chickpeas for approximately $1.8 million with payment due on delivery.[31]

22. Following the delivery by Dracoma of the 2017 crop, and its export by the Company to Vijay Pulse Pte Ltd (an Indian based importer), the anticipated Indian government tariff imposition took place levelling import duties of $521,455.56 on the transaction.[32] This, coupled with the collapse of the chickpea market in India, and the inability of the Company to complete its sale of the 2017 crop to the Indian buyer, resulted in the collapse of the Company's business with its subsequent cessation of trade in January 2018 and its liquidation the following year.[33]

C. PROVISION AND PRINCIPLES

23. Section 588FDA of the Act provides in relation to unreasonable director-related transactions:

> **s 588FDA Meaning of *unreasonable director - related transaction***
> (1) A transaction of a company is an unreasonable director - related transaction of the company if, and only if:
> (a) the transaction is:
> (i) a payment made by the company; or

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[29] Red Book 103C-H

[30] J [143]-[148]; Red Book 87H-X

[31] J [169], [173], [176]; Red Book 92K-L, 92U, 93J

[32] J [182]; Red Book 93X

[33] J [180]-[198]; Red Book 93T-95V

(ii) a conveyance, transfer or other disposition by the company of property of the company; or
(iii) the issue of securities by the company; or
(iv) the incurring by the company of an obligation to make such a payment, disposition or issue; and

(b) the payment, disposition or issue is, or is to be, made to:
(i) a director of the company; or
(ii) a relative of a director of the company; or
(iii) a relative of a spouse of a director of the company; or
(iv) a person on behalf of, or for the benefit of, a person of a kind referred to in subparagraph (i), (ii) or (iii); and

(c) it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
(i) the benefits (if any) to the company of entering into the transaction; and
(ii) the detriment to the company of entering into the transaction; and
(iii) the respective benefits to other parties to the transaction of entering into it; and
(iv) any other relevant matter.

24. It has been observed that the purpose of s 588FDA is "to catch director related transactions of kinds not otherwise liable to avoidance as unfair preferences, uncommercial transactions or unfair loans" : see *Vasudevan v Becon Constructions (Australia) Pty Ltd* (2014) 41 VR 445; [2014] VSCA 14 at [28] (Nettle JA, Beach JA and McMillan AJA); *Smith v Starke (No 2)* (2015) 109 ACSR 145; [2015] FCA 1119 at [106] (Gleeson J); ***Crowe-Maxwell** v Frost* (2016) 91 NSWLR 414; [2016] NSWCA 46 at [67]–[92] (Beazley P, Macfarlan and Gleeson JJA).

25. The test in s 588FDA(1)(c) is an objective one, which requires "an answer to the question what a reasonable person in the company's circumstances may be expected not to do": see *Re IW4U Pty Ltd (in liq)* (2021) 150 ACSR 146; [2021] NSWSC 40 at [82] (Gleeson J).

26. The focus of the section is not the director's conduct but the reasonableness of the company's conduct, objectively assessed, in entering into the transaction: see *Weaver v Harburn* (2014) ACSR 416; [2014] WASCA 227 at [79] (McLure P, Buss and Murphy JJA). It is an objective inquiry. Normal commercial practice is relevant but not decisive on the question of what "may be expected" of the reasonable person: cf *Welcome Homes Real Estate Pty Ltd v Ziade Investments Pty Ltd and Anor* [2007] NSWCA 167 at [54] (Spigelman CJ, Hodgson and Santow JJA).

27. The Queensland Court of Appeal considered s 588FDA in the decision of ***Featherstone*** *v Ashala Model Agency Pty Ltd (in Liq)* [2018] 3 Qd R 147; [2017] QCA 260 (Sofronoff P, Morrison and McMurdo JJA). At [71] Sofronoff JA referred to the history and purpose of the provision including in circumstances where the director recipient was also a creditor of the company in question:

> [71] In 2003, s 588FDA was inserted into the Act. That section took the "reasonable person" element of the definition of an uncommercial transaction and coupled it with the element of the identity of the payee as a director or a director's "close associate". It expressly recognised that the company's counterparty in the transaction might be an existing creditor by providing that the time for testing reasonableness is to be the date of the payment and not the date on which the obligation was incurred that has been satisfied by the transaction. In short, an unreasonable director-related transaction might be constituted by a payment to a director who is a creditor in respect of an obligation undertaken at a time before any relation-back period began and at a time when the company was solvent. If the payment also constitutes a preference, the fact that the six month period for unwinding simple preferences has passed will not matter. Upon proof of the additional elements contained in s 588FDA(1) the payment will be voidable if made within four years of the relation-back day. These provisions were inserted by the *Corporations Amendment (Repayment of Directors' Bonuses) Act 2003* (Cth). They were directed at payments made to directors in circumstances in which it appeared that full knowledge of the financial affairs of the company showed that no reasonable person would have made the payment. The rationale for extending the relation-back period to four years lies in the connection that the payee has with the company and the position of advantage that it can be presumed that that person (or the person's associate within the company) enjoyed.

28. At [124]-[125], citing the Court of Appeal's decision in ***Buzzle Operations*** *Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47; [2011] NSWCA 109, Morrison JA considered the concept of unreasonableness or uncommericality and the relevance of other creditors to the assessment:

> [124] In considering whether a transaction is for the benefit, or to the detriment, of a company, a relevant factor is the interests of the unsecured creditors: *Demondrille Nominees Pty Ltd v Shirlaw* (1997) 25 ACSR 535 at 548. A transaction which has the effect of reducing the company's debts may nonetheless be an uncommercial transaction if it adversely affects the interests of other creditors, as Young JA said in *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd*: (2011) 81 NSWLR 47 at [115]:
>
> > The primary judge held at [222] that Buzzle (as distinct from its creditors) suffered no detriment from the relevant transaction.

> With respect this cannot be correct. It is true, as the primary judge stated, that in making the payments Buzzle reduced its debts to the Resellers. However, that was not the whole picture. Buzzle had limited resources and to deprive itself of liquidity before it legally had to do so, where it had other pressing creditors and a need to expend monies on its computer accounting system amounted to a detriment.
>
> "Detriment" in the section is not limited to a detriment that can necessarily be measured in money terms. The word refers to commercial detriment.
>
> [125] The court will look at "the totality of the business relationship between the parties, and to what the parties under their relationship intended to effect, and how their intention was effected, in part or in whole, by the impugned transaction". *Cussen v Sultan* (2009) 74 ACSR 496 at [23].

29. A defendant to a claim under s 588FDA bears the evidentiary onus of raising some commercial explanation for the sought to be impugned transaction: *Crowe-Maxwell* at [89]-[92]. See also *CEG Direct Securities Pty Ltd v Cooper as Liquidator of Runtong Investment and Development Pty Ltd (In Liq)* (2025) 309 FCR 66; [2025] FCAFC 47 at [153]-[154] (Cheeseman and McEvoy JJ); *Aviation 3030 Pty Ltd (in liq) v Lao, in the matter of Aviation 3030 Pty Ltd (in liq)* [2022] FCA 458 at [314] (Anastassiou J). The absence of any commercial explanation in respect of the $250K Payments is of significance in this appeal.

D. THE GROUND OF APPEAL

30. The single ground of appeal as set out in the Notice of Appeal filed 4 April 2025[34] is that the primary judge erred at J [240] in finding that the $250K Payments were unreasonable director related transactions within the meaning of s 588FDA of the Act.

31. The appellants' Outline of Submissions filed 24 June 2025 (**AS**) address three circumstances referred to by the primary judge at [239] which preceded his Honour's conclusion in relation to the matter. The submissions set out from paragraph 355 below follow the structure and headings of the AS.

32. As a preliminary matter, and having regard to the appellants' various arguments as set out in the AS, there is no dispute as to whether the $250K Payments satisfied the requirements of s 588FDA(1)(a) and (b) of the Act (i.e. whether the transactions comprised payments to a director *etc.*).

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[34] Red Book 115

33. Rather, the appeal primarily concerns whether the requirements of s 588FDA(1)(c) were satisfied – that is, whether a reasonable person in the Company's circumstances would have made the payments having regard to the matters referred to in s 588FDA(1)(c).

34. In relation to this inquiry, a matter which infects a large bulk of the appellants' arguments is their failure, in the Court below, to give any explanation as to why the $250K Payments were made (or for that matter, any of the transactions that were sought to be impugned). There was no evidence led in chief by the appellants in relation to these transactions. The Court was only favoured with a number of faint assertions in relation to the transactions in the course of cross-examination.[35] It was of course the appellants' onus to raise the explanation however they did not do so: see *Crowe-Maxwell* at [89]-[92] referred to at paragraph 29 above.

Admitted intention irrelevant – AS [13]-[17]

35. One of the circumstances identified by the primary judge in finding that the $250K Payments were unreasonable director-related transactions was that at the time of the transactions (on 20 September 2017), the Company held an intention to purchase Dracoma's 2017 crop. As referred to in paragraph 16 above, the primary judge had regard to the admission in the pleadings of the Company's intention as far back as July 2017 to purchase the 2017 crop of chickpeas from Dracoma.[36]

36. The appellants refer to this conclusion (as arising on the pleadings) as a "contemplation in the abstract" of Prashant and Dr Pandya months before the 2017 harvest[37] and which can have no relevance to the reasonableness of the loan repayments made on 20 September 2017.[38] It is complained that the admission on the pleadings "admits nothing about the Company's intentions after that date" (being after July 2017),[39] and that Prashant's statement in cross-examination that there was "no plan" for the Company to

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[35] See for example J [224]; Red Book 99U-100D where, in relation to why the $250K Payments were made, the primary judge referred to Prashant's *"glib assertion that the money was "not required""*

[36] Commercial List Response [7]; Red Book 49L; JS [231]; Red Book 101J-K

[37] AS [13]-[14]

[38] AS [17]

[39] AS [14]

purchase "given the likelihood of the imposition of an Indian tariff" is not to be displaced.[40]

37. The appellant's pleaded position on this topic cannot be downplayed and disregarded as some kind of unintended statement. The effect of admissions on pleadings in civil litigation is well established; a party may admit facts on pleadings which cannot, until formally retracted by leave, be contradicted by the party who makes it: *Cross on Evidence* (1991, Butterworths) at [3165]. It is of course well settled that the function of pleadings serves to define the issues for decision in litigation, and any relief granted must be founded on the pleadings: see *Dare v Pulham* (1982) 148 CLR 658 at 664 (Murphy, Wilson, Brennan, Deane and Dawson JJ).

38. Prashant's evidence in cross-examination as to the absence of a "plan" was as follows:

> Q. The payments should have been - the fact of the matter was that in September 2017, you were approaching the harvest season, were you not?
>
> A. Yes, we were.
>
> Q. For chickpeas. You knew that the chickpeas were to be harvested in late 2017, correct?
>
> A. That is correct.
>
> Q. You knew that there was going to be a cost to purchase more chickpeas in late 2017, correct?
>
> A. That is correct, but there was no plan for the purchase. As mentioned earlier, there was a likelihood of an import tariff getting, getting put on by Indian government, so there was no--
>
> Q. But you were still in the business of buying and selling chickpeas, irrespective of whether it was into Indian or not, weren't you?
>
> A. Yes, we were but we--
>
> Q. And you were in a position where the company needed to buy stock in late 2017 for the purposes of carrying out its business, correct?
>
> A. We never intended to sell it to any other country apart from India or we never, never have.[41]

39. While Prashant's statement that there was "no plan" may be regarded as there being no arrangement in place in September 2017 to acquire the stock, the statement does not resile from the fact that there remained an intention on the part of the Company to acquire the stock from Dracoma, this being consistent with the appellants' pleaded

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[40] AS [15]

[41] T351.23-44; Black Book 240L-V

position and is in fact what occurred. Consistent with the primary judge's reasoning at J [238],[42] the pleaded position was decisive of the issue and could not be contradicted by reference to evidence given in cross-examination.

40. In any event, there was of course other evidence that by the time of the $250K Payments, the Company intended to acquire the further stock. In particular, on 18 and 19 September 2017 (being in the days just prior to the $250K Payments) both Prashant and Dr Pandya emailed one another discussing their plans in respect of the next harvest.[43] Further, in Prashant's email of 20 September 2017 to Dr Pandya he confirmed having made the $250K Payments and he referred to the next season as *"looking good for us already (touch wood) let's try to make a killing, we may not want to break records but lets make biggest margins etc"*.[44]

Loan funding not considered – AS [18]-[28]

41. The appellants seek to challenge the primary judge's factual finding at J [236][45] which is that the effect of the $250K Payments was that the only means that would be available for the Company to pay for the likely cost of purchase of the 2017 crop would be the proceeds from its sale.

42. The complaint is that the primary judge ignored the historical and subsequent financing that the Company had received from the Changela family members and Dr Pandya's company, and that this effectively explained the reasonableness of the transaction.

43. The difficulty with this submission is that (as referred to above at paragraph 344), the appellants led no evidence which raised even some commercial explanation for $250K Payments. Again, the onus was on the appellants to do so. It would have been open for the appellants to, for example, raise in their evidence the prospect of the Changelas or Dr Pandya's company being in a position to (if necessary) assist the Company in financing the 2017 crop purchase, but they did not.

44. Particularly in the absence of this explanation, the primary judge's findings concerning the circumstances of the Company at the time of the $250K Payments as summarised

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[42] Red Book 102U

[43] Blue Book 119E -120G

[44] Blue Book 58K

[45] Red Book 102C

at J [232]-[236][46] were available. In particular, at the time Prashant and Dr Pandya were looking to acquire the stock and having regard to the Company's balance sheet position,[47] the effect of the payments was that the Company was effectively substantially "underwater". Indeed, the 250K Payments resulted in the Company having a reduced cash position of just $186,855.17.[48] In these circumstances, and as found by the primary judge "the only means that would be available for the Company to pay for the likely cost of purchase of the 2017 Crop would be the proceeds of its sale".[49]

45. In the absence evidence from the appellants, it was not for the primary judge to infer a commercial rationale or justification for the transactions, or contemplate that the appellants would have lent funds to the Company if it so required. Moreover, as to the financing of the Company that occurred prior to and after the $250K Payments, these events are in any event irrelevant. This is so because s 588FDA(2)(b) focusses the inquiry only upon the circumstances that existed at the time that the relevant transaction was entered into.

Loan repayable on demand – AS [29]-[31]

46. The appellants submit at AS [30] that by reason that the loans were repayable on demand, there was no "proper or commercial basis to withhold the repayment of the loans".

47. In relation to this submission, the primary judge did not determine at J [116][50] (as intimated at AS [29]) that the loans were "in effect, repayable, on demand". Rather, his Honour found at [116] that the advances were loans repayable "whenever Prashant, Rajan and Dr Pandya so determined". As referred to at paragraphs 14 and 15 above, in cross-examination Prashant clarified the arrangement and confirmed that the funds would be repaid when they were not "required" by the Company.

48. And in any event, contrary to the appellants' submission, there was every reason to withhold the repayment of the loans and it was entirely unreasonable for the de facto

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[46] Red Book 101M-102G

[47] Blue Book 132

[48] Blue Book 109E-F

[49] J [236]; Red Book 102E-G

[50] Red Book 84C

directors not to do so. In September 2017, the Company was in a tenuous position. It was about to embark upon an acquisition of stock in circumstances where a significant tariff imposition by the Indian government on such stock was likely. The 2016 crop purchase from Dracoma cost the company in excess of $1.5 million and the 2017 crop must have been expected to be of a greater cost and risk to the Company, including given the expectation of the tariff imposition.

49. The funds comprising the $250K Payments were plainly "required" for the purpose of the pending transaction with Dracoma. As recognised in decisions such as *Buzzle Operations* at [116], when considering the question of whether a transaction caused detriment within the meaning of s 588FDA(1)(c)(ii), it is the whole picture that is to be assessed. In this regard, while it might be said that the $250K Payments reduced the Company's indebtedness to its lenders, there was no legal or commercial requirement for this to occur, and there was a looming transaction (in the contemplation of Prashant and Dr Pandya) which required the Company to be in funds. As recognised by Young JA in *Buzzle Operations* at [117], "detriment" in the s 588FDA(1)(c)(ii) is not limited to a detriment that can necessarily be measured in money terms, but also refers to commercial detriment.

Subjective considerations irrelevant – AS [32]-[38]

50. As to the primary judge's reference at J [236][51] to the absence of evidence from Prashant and Dr Pandya as to whether the payment would have had a negative impact on creditors of the Company or the financial ramifications, having regard to the authorities set out in paragraphs 255 and 266 above, it is accepted that the test is an objective one where the subjective consideration of the defendant at the time of the transaction is likely irrelevant. That said, given the limited evidence of the nature or purpose of the transaction, and the circumstances surrounding the $250K Payments which may be said to raise questions as to the lack of benefit to the Company and benefit accruing to its de facto directors, an explanation from the appellants was called for. In this respect, and again having regard to the statements of this Court in decisions such as *Crowe-Maxwell* at [89]-[90], the primary judge was correct to at least note at J [236] the absence of evidence from Prashant and Dr Pandya in relation to their consideration as to the financial ramifications of the impact of the transactions on the Company.

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[51] Red Book 102C

51. However and in any event, the primary judge's reasons do not depart from the objective approach to the inquiry. Expressly recognising at J [228][52] that the test is an objective one, the primary judge correctly went on at J [230] to J [238][53] to consider the totality of the business relationship and, citing *Featherstone* at [125], "what the parties under their relationship intended to effect, and how their intention was effected, in part or in whole, by the impugned transactions".

52. At AS [37], the appellants seek to excuse the $250K Payments in circumstances where there was an absence of ongoing costs to meet at the time such as rental of premises or payments to employees that might require the retention of funds. Again, this ignores the wider consideration of the primary judge which properly took into account the pre-existing intention to purchase the 2017 crop (and all of the financial risk associated with that endeavour).

53. The appellants also contend at AS [37] that the objective evidence demonstrated that the Company would continue to be funded by advances from the Changela family and Dr Pandya as and when required. As referred to above and again, there was no evidence before the Court below from any defendant which could be said to substantiate such a submission.

E. CONCLUSION

54. The appeal ought to be dismissed with costs.

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[52] Red Book 101C

[53] Red Book 101H-102X