Law Society of New South Wales
Developments in Corporate and Commercial Practice One day intensive
20 June 2023

Developments in commercial and corporations case law and practice[1]

Justice Ashley Black

Introduction

This paper reviews several developments in commercial and corporations case law in 2022 and the first half of 2023, primarily focussing on decisions in New South Wales. I first consider practice in the Commercial and Corporations Lists, then several commercial matters, including recent cases as to share sale agreements and contractual construction, unjust enrichment and resulting trusts, then a recent appellate decision as to solicitor's negligence, and cases concerning calls on a bank guarantee, review under the *Contracts Review Act* 1980 (NSW) and the interaction between voluntary administration and the *Building and Construction Industry Security of Payment Act* 1999 (NSW). I then consider several corporations cases relating to directors' duties, the Arrium case, schemes of arrangement and then several cases in insolvency law.

Practice in the Commercial and Corporations Lists

I first address several practical matters, at the risk of noting the obvious. Practice Notes SC Eq 3 deals with practice in the Commercial List. Rule 45.6 of the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") provides that matters appropriate to be entered into the Commercial List include proceedings arising out of commercial transactions and proceedings in which there is an issue that has importance in trade or commerce. Proceedings in the Commercial List are generally governed by the UCPR. A matter in the Commercial List should be commenced in the form of summons prescribed under the UCPR. This is to be filed with a list statement, setting out in summary form the nature of the dispute, the issues likely to arise, the plaintiff's contentions, the questions to be referred to a referee and a statement as to whether the parties have attempted to mediate and whether the plaintiff is willing to proceed to mediation.

Practice Note SC Eq 4 deals with practice in the Corporations List. The Corporations List Practice Note identifies matters that are appropriate for the Corporations List as including any proceedings or applications under or in respect of matters relating to the *Corporations Act* 2001 (Cth), the *Australian Securities and Investments Commission Act* 2001 (Cth), the *Cross-Border*

[1] This discussion of practice in the Corporations List in this paper draws on earlier papers, including "Practice in the Corporations List and recent case law - Commercial Law Association Seminar", 8 July 2022 and the discussion of corporations cases partly draws upon RP Austin & AJ Black, Overview as to Developments in Corporations Law 2022, published in LexisNexis' Australian Corporations Legislation 2023. My tipstaff, Harris Kershaw, prepared the summary of practice in the Commercial List and the review of case law concerning resulting trusts and advancement and s 247A of the *Corporations Act* which I have adopted with his permission.

Insolvency Act 2008 (Cth) and the Supreme Court (Corporations) Rules 1999 (NSW) ("Corporations Rules").

Proceedings in the Corporations List are also governed by the UCPR, and by the Corporations Rules, which are uniform with the Federal Court and other State Supreme Courts and have some differences from the procedures under the UCPR, and also require particular steps in particular applications. Where an application is not made in a proceeding already commenced in the Corporations List, it is to take the form of an originating process (rather than a summons or statement of claim); and, in any other case, an interlocutory process is to be filed, even if the relief claimed is final relief. The originating process in corporations matters is not in the form of a pleading but the Court may make an order for the matter to continue by pleadings.[2] Rule 2.8 of the Corporations Rules requires notice of certain applications in the Corporations List to be given to the Australian Securities and Investments Commission ("ASIC"). Rule 2.13 allows an application for leave to be heard in corporations proceedings, as an alternative to being joined as party to the proceedings under the UCPR. A person who is granted leave to be heard without becoming a party under r 2.13(1) has a more limited costs exposure but can also have a lesser expectation of being awarded costs.[3]

In the Commercial List, a motions and directions list takes place before the Commercial List Judge on Friday mornings. Consent orders can be made by the List Judge in Chambers by emailing the List Judge's Associate prior to Thursday noon to avoid the cost of an appearance. In the Corporations List, motions and directions list takes place before the Corporations List Judge on Monday mornings, with motions called at 9:15am and directions at 10am. Consent orders can be made in Chambers by emailing my Associate prior to noon on Friday in the previous week to avoid the cost of an appearance. Solicitors can also contact my Associate to obtain fixed hearing dates for schemes of arrangement under Pt 5.1 of the *Corporations Act* where it is commercially important to obtain definite hearing dates before filing. Urgent commercial and corporations matters, including applications for short service, are listed by approaching the Associate to the Commercial List Duty Judge or the Corporations Duty Judge in Court or in Chambers, preferably after notice of the approach has been given to his or her Associate by telephone or email.

Practice Note SC Eq 11, "Disclosure in the Equity Division" applies to proceedings both in the Commercial List and Corporations List, and as to proceedings in the Equity Division generally, with the exception of the Commercial Arbitration List. The Practice Note has also been applied to extensive notices to produce, which are functionally equivalent to applications for discovery, by analogy.[4] The Commercial List Practice Note also has guidance on discovery relevant to that List.

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[2] *Edenden v Bignell* [2008] NSWSC 666.
[3] *Re Pan Pharmaceuticals Ltd; Selim v McGrath* [2004] NSWSC 129; (2004) ACSR 681 at [20]; *Re HIH Casualty and General Insurance Ltd* [2006] NSWSC 6; *Re Jabiru Satellite Ltd (in liq)* [2022] NSWSC 459.
[4] For example, *Owners Strata Plan SP 69567 v Baseline Constructions Pty Ltd* [2012] NSWSC 502; *Re Mempoll Pty Ltd* [2012] NSWSC 1057; *Bauen Constructions Pty Ltd v New South Wales Land & Housing Corporation* [2014] NSWSC 684; *Rhinehart v Rhinehart* [2015] NSWSC 205.

Parties should seek to avoid leading substantial affidavits at a very late stage. It is common practice, at least in the Corporations List, that, when fixing a matter for hearing, the Court will also make a direction that affidavits served after the date specified in the directions may not be read without leave of the Court. It cannot be assumed that such leave will be granted. First, s 61(3) of the *Civil Procedure Act* 2005 (NSW) ("*CPA*") provides that, if a party to whom a direction has been given fails to comply with it, the Court may disallow or reject any evidence that party has adduced or sought to adduce. Second, UCPR r 10.2 provides that a party intending to use an affidavit that has not been filed must serve it a reasonable time before the occasion for using it arises, and a party who fails to serve an affidavit as required by that rule must not use it except by the Court's leave. The Court's power to disallow or reject an affidavit under *CPA* s 61(3) and to grant or withhold leave to read it under UCPR r 10.2 must be exercised in accordance with the obligations imposed by *CPA* ss 56–60 and specifically the overriding purpose and the objectives of case management. The Court may well decline leave to read a later affidavit where doing so would cause prejudice to the other party, particularly if that prejudice cannot readily be accommodated by an order for costs or an adjournment; for example where allowing that affidavit to be read would require an adjournment of the final hearing.

Four cases in relation to sales of businesses

Contractual construction

In *Laundy Hotels (Quarry) Porty Ltd v Dyco Hotels Pty Ltd* (2023) 407 ALR 613; [2023] HCA 6, the High Court overturned a decision of the Court of Appeal of the Supreme Court of New South Wales in holding that the vendor of a hotel did not breach an obligation to conduct the business in the usual and ordinary course, by ceasing to trade as required by public health orders made in connection with the COVID-19 pandemic. In reaching that result, the Court cited *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 at 551 and reaffirmed that:

> "It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it."

The Court held that the requirement to conduct the business in the usual and ordinary course included a requirement to conduct it according to law, so that the cessation of trading required by law did not breach the obligation to conduct the business in the usual and ordinary course. The Court also held that no contrary implied term was established.

In *J & P Marlow (No 2) Pty Ltd v Hayes & McCabe in their capacity as joint and several liquidators of Peak Invest Pty Ltd (in liq)* [2023] NSWCA 117, the Court of Appeal also dealt with complex questions of construction arising from substantially identical hotel management agreements, relating to the sale of hotels operated within a complex structure. The question of construction

concerned whether the reference to "sale price of the Property" in the hotel management agreements, which affected the calculation of a performance fee, included the sale price of the land on which each hotel was constructed and the hotel business and gaming machine entitlements, or (as Williams J found) only included the land and excluded that part of the sale price that was attributable to the hotel business and gaming machine entitlements.

The Court of Appeal dismissed the appeal and, in doing so, again addressed the principles of construction of a commercial contract, where the terms of a contract led to an arguably "uncommercial" result. Bell CJ observed (at [75]-[79]) that

> "Ordinarily, the process of contractual construction is possible by reference to the terms of the contract alone ... Although ... the meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean and this will require consideration, inter alia, of the commercial purpose or objects to be secured by the contract, the commercial purpose is to be discerned objectively, with the contract itself supplying the best source for the ascertainment of that objectively determined purpose ...
>
> One must also be cautious in attributing a particular commercial intent or understanding of commercial common sense to parties to a commercial agreement.
>
> Moreover, attributed commercial purpose may not be used by a court to give to the words of a contract a meaning that they cannot reasonably bear ..."

Meagher and Kirk JJA agreed with the result and observed (at [89]-[90]) that:

> "Four members of the High Court summarised the core principles of construction of commercial contracts as follows in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35]:
>
> (1) The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean.
>
> (2) That requires consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. That, in turn, is facilitated by an understanding of the genesis of the transaction, the background, the context and the market in which the parties are operating.
>
> (3) Unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption that the parties intended to produce a commercial result. The contract is to be construed so as to avoid it making commercial nonsense or working commercial inconvenience.
>
> Put simply, as Gageler, Nettle and Gordon JJ stated in *Simic v New South Wales Land and Housing Corp* (2016) 260 CLR 85; [2016] HCA 47 at [78], the "proper construction of [a contract] is to be determined objectively by reference to its text, context and purpose" (citation omitted). Inherent in recognition of the importance of context and purpose is that the construction

> adopted may depart from the literal or ordinary meaning of the words employed. Gibbs J, for example, indicated as much in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99; [1973] HCA 36...at 109, citation omitted):
>
> > if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, "even though the construction adopted is not the most obvious, or the most grammatically accurate"... Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument."

Meagher and Kirk JJA there recognised that a reasonable businessman may have understood the commercial purpose of the relevant agreements as to reward the hotel manager for its contributions to an increase in the value of the property and business together, not merely the value on the freehold property. However, they held that that result was not available on the language of the relevant provisions.

Restraints of trade

The Court of Appeal also considered the question of restraint of trade provisions in the context of a business sale agreement in *DXC Eclipse Pty Ltd v Wildsmith* [2023] NSWCA 98. At first instance, Parker J had found that a 7 year restraint of trade, in a series of cascading permutations, was not breached where one of the vendors of the business established a new business that offered different services to the business that had been sold. The Court of Appeal upheld that finding, which was sufficient to determine the case, but also held that the 7 year restraint was unreasonable in the circumstances, and gave limited weight to a contractual acknowledgement as to its reasonableness of that restraint, where it would apply with multiple variations. Bell CJ also observed that a "disconformity" between the restraints contained in the defendant's employment agreement and the restraints contained in the business sale agreement was not "wholly irrelevant", and observed (at [162]) that:

> "Although the reasonableness of any restraint is to be assessed as at the time at which the relevant contract has been entered into, the discretion whether to enforce any restraint may be informed by considerations at the time enforcement is sought..."

Warranty claims and misleading conduct

The Federal Court of Australia also considered misleading conduct claims and warranty claims against the vendor of a business in a recent judgment in *Optic Security Australia No 2 Pty Ltd v YC Investments (NT) Pty Ltd* [2023] FCA 495. Optic had acquired a business ("STS") from YC Investments and others, and had calculated its purchase price by reference to forecast earnings including the forecast profit under a substantial contact held by STS. Optic brought a claim for misleading and deceptive conduct under s 18 of the *Australian Consumer Law* and warranty claims in respect of the sale.

Charlesworth J also held that Optic's claims under the *Australian Consumer Law* were not barred by contractual provisions applicable to warranty claims, but they failed on their facts. Charlesworth J accepted (at [199]) that a representation as to gross profit margin related at least in part to a future event, namely the total profit to be enjoyed by STS at the date of completion, and would be taken to be misleading under s 4 of the *Australian Consumer Law* if YC Investments did not have a reasonable basis for making it. Her Honour also reviewed (at [184]ff) the authorities as to the extent to which that section imposed an evidential burden on a respondent to adduce evidence as to whether there were reasonable grounds for making a representation. Her Honour found that YC Investments had discharged the burden of leading evidence to the contrary so that (in a double negative) it was *not* deemed *not* to have had a reasonable basis to make the representation as to forecast gross profit margin.

Optic's warranty claims also failed, where Optic had not complied with the requirements to make such claims under the sale agreement. Charlesworth J held (at [273]) that a wide definition of "claim" in the sale agreement, which included "allegations", applied once Optic came "to believe (rightly or wrongly) in the existence of facts and circumstances that, if true, could properly found an allegation of breach", and held that Optic had not complied with an obligation to notify the seller of that claim as soon as practicable after that point.

Principles of unjust enrichment

Principles of unjust enrichment were considered by the Court of Appeal in *Coshott Family Pty Ltd v Lyons* [2022] NSWCA 216, where the appellant relied on a claim in unjust enrichment in order to seek to recover amounts transferred out of a solicitor's controlled money account, which it contended had been transferred without authority. Kirk JA (with whom Meagher JA and Griffiths AJA agreed) observed (at [22]) that a claim in unjust enrichment required the plaintiff to establish a "qualifying or vitiating factor", and that such factors might include mistake, duress, the legality or failure of consideration although the relevant categories were not closed. The Court of Appeal accepted that a claim for unjust enrichment may be available where a principal had paid money to an agent and authorised its disposal in a particular manner, and proved that the agent had not paid out the money or had dealt with it inconsistently with that manner of payment. However, the appellant failed as to substantial part of its claim, where it had not established that matter, or a qualifying or vitiating factor to support the claim.

The presumptions of resulting trust and advancement

Two recent decisions have considered the equitable presumptions as to a resulting trust and as to advancement. The presumption of a resulting trust arises where a person advances purchase monies for property, which is held in the name of another person, and presumes the person advancing the funds intends to have a beneficial interest in the property. The presumption of advancement applies in the case of a purchase by a husband in the name of a wife, or a parent in the name of a child, and presumes that the purchased

property is gifted to the wife or child. The presumption of advancement can qualify or exclude the presumption of resulting trust.

These two presumptions were considered by the High Court in *Bosanac v Commissioner of Taxation & Anor* (2022) 405 ALR 424; (2022) 65 Fam LR 508; [2022] HCA 34. Kiefel CJ and Gleeson J treated the presumption of advancement as somewhat anachronistic, and noted that it is unlikely that evidence capable of rebutting both presumptions would not be available and that both presumptions could be rebutted with "comparatively slight evidence". Gageler J observed that both presumptions are only significant in rare cases, where the totality of the evidence is incapable of establishing intention on the balance of probabilities. Gordon and Edelman JJ noted that the presumption of a resulting trust should be considered a "weak presumption," citing changed circumstances since the presumption was recognised in the 15th century. The High Court nonetheless held that both presumptions were too well-established to be overturned other than by legislative intervention.

Shortly after that decision, the Full Court of the Federal Court decided *Stolyar v Scott (Trustee)* [2023] FCAFC 61. A trustee in bankruptcy there contended that that Mr and Mrs Stolyar had provided purchase money towards the purchase of properties in Mr Stolyar's mother's name. At first instance, and prior to the High Court decision in *Bosanac*, Mr and Mrs Stolyar contended that the $9 million had been provided by the mother, and the trustee in bankruptcy contended that the Mr and Mrs Stolyar had provided the purchase money. The principles relating to a presumed resulting trust were therefore not in issue at first instance. The Full Court noted (at [59]) that the *Bosanac* decision had been raised in submissions, for the proposition that the presumption of a resulting trust had narrow operation, but did not decide that question where it was first raised on appeal. In obiter, the Full Court noted (at [66]) that *Bosanac* does not indicate any departure from the principle that there is a presumption of a resulting trust where a person advances purchase money for property which is held in the name of another person and also noted the:

> "passage in the joint judgment of Gordon and Edelman JJ at [109] which suggests that where the objective facts based on evidence led by the plaintiff tend to establish, even weakly, an objective intention inconsistent with a declaration of trust, then there will be no case for the defendant to meet and the presumption of resulting trust will not arise".

The Full Court also observed that the other judgments in *Bosanac* did not contain a corresponding statement. Other recent decisions that consider *Bosanac* include *Vanta Pty Ltd v Mantovani* [2023] VSCA 53, *Koprivnjak v Koprivnjak* [2023] NSWCA 2 and *Galati v Deans & Ors* [2023] NSWCA 13.

Solicitors' negligence

The Court of Appeal also considered a claim for solicitors' negligence in *Shoal Bay Beach Constructions No.1 Pty Ltd v Hickey* [2023] NSWCA 23. The appellant there contended that the solicitor had failed to advise it of the need to give notices to extend the time for completion for contracts for the sale of strata units off the plan, and that the purchasers had then rescinded the contracts, depriving it of the profits from the sales. The Court of Appeal found

that the solicitors had been retained to negotiate and advise as to the extension of certain contracts, but that retainer did not extend to the contracts in issue. The Court also held that, in any event, the solicitors had previously advised the developer as to the contractual right to extend the relevant dates and a solicitor was not generally obliged to repeat advice that it had previously given to a client or advise as to maters that the client already knew.

Application of the Contracts Review Act to security arrangements

In two associated decisions, *Hojo Property Pty Ltd v Bass Finance No 37 Pty Ltd* [2023] NSWSC 411 ("*Hojo 1*") and *Hojo Property Pty Ltd v Bass Finance No 37 Pty Ltd (No 2)* [2023] NSWSC 493 ("*Hojo 2*"), Rees J considered the application of the *Contracts Review Act* 1980 (NSW) where a director and his wife had provided a guarantee and mortgage of the family home in order to finance a borrowing for property development by a company they controlled. They had business experience, although not in property development, they had limited English skills and the loan was made under time pressure. A solicitor had initially advised that an interpreter was needed to allow him to provide independent advice, the lender had then pressed for settlement of the loan to proceed without delay, and another solicitor then gave advice without an interpreter.

Rees J summarised the applicable principles (*Hojo 1* at [408]ff, *Hojo 2* at [25]) and noted that, although the company had there made the borrowing for the purpose of property development, the company rather than its directors carried on the relevant business and the directors were not excluded from relief by s 6(2) of the *Contracts Review Act*. Her Honour found that the basis for relief was established, but limited that relief to the unjust provisions of the loan arrangement, in respect of the higher rate of interest applicable for default and an "intensive management fee" payable on a continuing basis after default.

Restraining a call on a bank guarantee

In *Daewoo Shipbuilding Engineering Co Ltd v INPEX Operations Australia Pty Ltd* (2022) 404 ALR 503; [2022] NSWSC 1125, Daewoo sought an interlocutory injunction restraining INPEX from calling on a bank guarantee in excess of $328 million until an arbitral tribunal had determined a dispute between them in respect of a shipbuilding contract. Rees J noted (at [5]) that the bank guarantee was in the nature of an unconditional bond to pay on demand to a specified maximum amount, unqualified by the terms of the underlining contract between the parties, and (at [8]) that its function was to provide security and also allocate the risk of which party was out of pocket pending a resolution of their dispute. Her Honour held that Daewoo had not established a prima facie case of sufficient strength to continue the interlocutory injunction, where that bank guarantee operated as a "risk allocation device" which established a "pay now, argue later" regime, and the parties' contractual bargain contemplated that INPEX could call on the guarantee and hold the relevant funds, pending the determination of the dispute by the arbitral tribunal. Her Honour also held that the balance of convenience did not support the extension of the injunction, where Daewoo was in financial difficulty and the purpose of the guarantee was to protect

INPEX against the risk that its ability to enforce a judgment against Daewoo may be adversely impacted by that financial difficulty.

Directors' duties

The Court of Appeal has also recently addressed directors' duties, on appeal from the decision of Rees J in *BCEG International (Australia) Pty Ltd v Xiao* (2022) 162 ACSR 601; [2022] NSWSC 972. In that decision, Rees J considered a claim brought against a director and de facto director for breach of director's duties, relating to an alleged overstatement of development costs in relation to a private hospital and the issue of false invoices to divert funds to a project undertaken by their company. Her Honour reviewed the principles applicable to whether a person was a de facto director (at [329]-[333]); noted than an objective test was applied in determining whether a person in the position of a director for the purposes of s 9 of the *Corporations Act*; and identified relevant factors as including whether the director exercised the "top level of management functions"; whether the company held the person out as a director; and whether outsiders reasonably perceived the person to be a director of the company. Her Honour observed (at [333]) that the fact that the company has another active director does not prevent a finding that a person is a de factor director and held, in that case, that the wife of the company's statutory director, who was in Australia for longer periods than her husband and was in charge of the company's finance functions including its bank accounts, invoicing and accounting was a de facto director of the company. Rees J also accepted, uncontroversially, that the content and subject matter of fiduciary duties will depend on the circumstances (at [348]), but held that the directors' duties were not narrowed here in the absence of adequate disclosure. She held that the diversion of company funds to the project undertaken by another company associated with the director and de facto director amounted to a breach of their statutory and general law duties.

On appeal in *Xiao v BCEG International (Australia) Pty Ltd* [2023] NSWCA 48, the Court of Appeal largely dismissed an appeal from Rees J's decision. The Court of Appeal held that a claimant may obtain different remedies against a defaulting fiduciary and an accessory, for example, compensation against one and account of profits against the other. The Court allowed the appeal in part, so far as her Honour had allowed damages for loss caused by the defendants' failure to disclose their wrongful conduct. The Court confirmed the position, which had long been adopted in the Australia cases, that a director does not have a positive duty to disclose a conflict of interest or duty, although the disclosure would constitute a defence for breach of fiduciary duty.

Inspection of documents under s 247A of the *Corporations Act*

Section 247A of the *Corporations Act* allows the Court to make an order allowing a shareholder to inspect the books of a company, provided the Court is satisfied that the applicant is acting in good faith and for a proper purpose. In *Enares Pty Limited v Nimble Money Limited* (2022) 294 FCR 31; [2022] FCAFC 126, the Full Court of the Federal Court considered an application brought under s 247A of the *Corporations Act* by Enares, the largest shareholder, with 15% of the issued capital, in Nimble, an unlisted public company. Enares was dissatisfied with Nimble's decision to refinance its debt rather than raise funds through a rights issue that Enares had offered to

underwrite, and sought inspection of documents under s 247A to investigate whether Nimble's directors had breached their duties in pursuing the refinancing, or alternatively that Nimble's conduct was oppressive within the meaning of s 232 and 233 of the *Corporations Act*.

The Full Court gave (at [36]ff) a comprehensive account of the criteria to be considered in the good faith and proper purpose tests under s 247A of the *Corporations Act*. The Court noted (at [39]) that to make an order under this section, the Court must find, first, that the applicant's asserted purpose is a legitimate one, and, second, that the applicant has established by admissible evidence that it has the asserted purpose and the application has been made to advance it. The first of those matters was readily satisfied, where the Court observed that seeking inspection in order to ascertain whether there has been a breach of directors' duties or oppressive conduct was self-evidently within the scope of a proper purpose. The second matter was more difficult, and the Court observed (at [48]) that:

> "If there is no "case for investigation" or the applicant's issues are insubstantial or fanciful, or "artificial, specious or contrived", the concerns, even if subjectively held, cannot form a basis for an application made in good faith."

The Full Court concluded that the primary judge was correct to describe Enares' concerns as having "an air of commercial unreality", and, following a review of the commercial position of Nimble, found that Nimble's board had pursued the only appropriate course open to it. The Court held the evidence did not indicate there was an issue to investigate; Enares therefore could not satisfy the Court that it was acting in good faith in bringing the application too inspect documents under s 247A of the *Corporations Act*; and the appeal was dismissed.

Schemes of arrangement

There have been recent developments in respect of the procedures for schemes of arrangement, although there have been few schemes before the Courts this year.

In a case management conference and subsequently in his published judgments in *Re Vita Group Ltd* [2023] FCA 400 (first Court hearing) and *Re Vita Group Ltd (No 2)* [2023] FCA 623 (second Court hearing), Jackman J initially encouraged and then accepted several changes to the practice for schemes of arrangement. As to the form of affidavits in scheme applications, Jackman J indicated (*Re Vita Group Ltd* [2023] FCA 400 at [18]) that it was not necessary to exhibit all correspondence between the plaintiff's solicitors and ASIC to an affidavit read at the second Court hearing, where ASIC gives a statement indicating that it does not raise any objection to the scheme and (at [19]) that it was not necessary to file a separate affidavit from an independent expert verifying his or her report that is included any explanatory statement for the scheme.[5] His Honour dispensed (at [20]) with the requirement under r 2.4(2) of the Harmonised Corporations Rules for the

[5] That is consistent with my decision in *Re Beyond International Ltd* [2022] NSWSC 1649 at [20]-[23], holding that such a report is not expert opinion evidence under s 79 of the *Evidence Act* 1995 (NSW).

initial affidavit to state the facts in support of the Originating Process, where that will be addressed in later evidence. Evidence of that kind has always been led in short form. His Honour indicated (at [22]) that the consent of the chair and alternate chair of the scheme meeting could be proved by evidence on information and belief and (at [23]) that he would dispense with the publication of a notice of a hearing of the application in a newspaper, on the basis that the notice could be published by ASX announcement or by an announcement on a company's website if the company is not listed. His Honour also accepted a wider simplification of the structure of affidavit evidence led in respect of the scheme, which seems to me to be uncontroversial where the Courts have never mandated that particular affidavits be led in respect of a scheme.

Jackman J also indicated (at [24]) that he would not require evidence concerning negotiations for break fees and exclusivity provisions other than confirmation of the break fee as a percentage of the implied equity value of the scheme company, for consistency with the Takeovers Panel's guidance[6], and subject to ex parte disclosure obligations. This approach will require practitioners to make case by case judgments as to whether matters (for example, the length of an exclusivity period) are out of the ordinary so as to be raised as a matter of ex parte disclosure at a scheme hearing, rather than addressing them as a matter of course. That will likely simplify the Court's, but not necessarily the practitioner's, task at such a hearing.

Perhaps most controversially, Jackman J indicated (at [27]ff) that he would not review communications by a scheme company to its shareholders between the first court hearing and the scheme meeting and would leave the consideration of those communications to the second Court hearing.[7] Jackman J rightly recognised that that approach leaves scheme companies exposed to the risk that the scheme will not be approved at the second Court hearing, observing at [32] that:

> "The scheme company is to be at its own risk concerning such communications with shareholders, including as to whether they are misleading, and whether they may potentially jeopardise Court approval at the second Court hearing."

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[6] Contrast *Re APN News & Media Ltd* (2007) 62 ACSR 400; [2007] FCA 770 at [55]; and the consideration of these issues in cases including *Re Macquarie Private Capital A Limited* (2008) 26 ACLC 366; [2008] NSWSC 323 at [19]; *Re DUET* Finance Ltd [2017] NSWSC 415 at [28]-[29]; *Re Aveo Group Ltd and Aveo Funds Management Ltd* [2019] NSWSC 1348 at [44]; *Re TPG Telecom Ltd* [2020] NSWSC 772 at [22]; *Re Vocus Group Ltd* [2021] NSWSC 630 at [17]; *Re iSelect Ltd* [2022] FCA 1329 at [49]-[75].

[7] Contrast *Re Centro Retail Ltd* [2011] NSWSC 1321 at [10]-[11]; *Re Trust Company Ltd* [2013] NSWSC 1946 at [6]-[8]; *Re Amcom Telecommunications Ltd (No 3)* [2015] FCA 596 at [15]; *Re Investa Listed Funds Management Ltd* [2016] NSWSC 344 at [4]; *Re Investa Listed Funds Management Ltd* [2016] NSWSC 369; *Re Billabong International Ltd (No 2)* [2018] FCA 496; *Re Tawana Resources NL (No 2)* [2018] FCA 1724 at [18], [32]ff; *Re Prime Media Group Ltd* [2019] NSWSC 1888; *Re Walsh and Company Investments Ltd* [2020] NSWSC 1746 at [66]; *Re Zenith Energy Ltd; Ex parte Zenith Energy Ltd (No 2)* [2020] WASC 275 at [14]-[15]; *Redflex Holdings Ltd, Re Redflex Holdings Ltd (No 2)* [2021] FCA 474; *Re Tabcorp Holdings Ltd* [2022] NSWSC 448 at [22]; *Re ResApp Health Ltd* [2022] NSWSC 1014 at [15]ff; *Re ResApp Health Ltd* [2022] NSWSC 1090 at [11]ff; *Re ResApp Health Ltd* [2022] NSWSC 1353 at [33], [37]ff .

It is not easy to see why scheme companies or their advisers would prefer to leave securityholder communications to be reviewed only at a second Court hearing and risk the prospect of failure of a scheme at that hearing if those communications have undermined the integrity of the securityholder vote, rather than addressing any issue with those communications at an earlier stage while there is still time to correct it. This risk may be real, where there are cases in which scheme companies have amended a shareholder communication when approval for it was sought, to avoid difficulties that may otherwise have arisen at the second Court hearing.

In *Vita Group*, Jackman J also accepted (at [36]) that evidence as to despatch of scheme materials should not generally be required, although any issue in dispatch should be brought to the Court's attention, and (at [37]) that evidence as to the use of technology at scheme meetings is no longer necessary. His Honour did not express any view (at [38]) as to the position as to proof of due execution of a deed poll by a foreign bidder which is required by the earlier decision of the Federal Court of Australia in *Re Simavita Holdings Ltd* [2013] FCA 1274[8] and reserved (at [39]) the position as to proof of funding for special purpose bidding vehicles.[9]

After the first *Vita Group* judgment was delivered, the Federal Court of Australia began a consultation process in respect of possible changes to the approach to schemes of arrangement. The consultation letter suggests possible further changes in approach from that taken in *Vita Group*, by foreshadowing that evidence of despatch of scheme documents and proof of voter turnout at scheme meetings would still be required.

On 19 May 2023, the Supreme Court of New South Wales reissued Practice Note SC EQ 4 - Corporations List which supported simplification of evidence and process for schemes, but also observed, in a recognition of the orthodox approach to precedent, that:

> "As practitioners would understand, the Court's approach to substantive issues arising in scheme applications will necessarily be guided by the existing and developing case law, for example as to communications by a scheme proponent to its shareholders or unitholders, proof of due execution of a deed poll by a foreign bidder and proof of financial arrangements supporting bids by special purpose bidding vehicles."

Claims under SOPA by a company subject to a deed of company arrangement

The first instance decision in *Kennedy Civil Contracting Pty Ltd (admins apptd) v Richard Crookes Construction Pty Ltd* [2023] NSWSC 99 considers the position where a company is placed under a holding deed of company arrangement ("DOCA"), rather than in liquidation, in order to preserve its ability to bring a payment claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) ("SOPA"). The head contractor

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[8] In a subsequent decision, in *Re Blackmores Ltd* [2023] FCA 624, Jackman J departed from the approach to proof of due execution taken in the Federal Court since *Simavita*.

[9] For case law, see *Re Spark Infrastructure RE Ltd* [2021] NSWSC 1564; *Re Sydney Airport Ltd and Trust Co (Sydney Airport) Ltd as responsible entity for Sydney Airport Trust 1* [2022] NSWSC 25; *Re ELMO Software Pty Ltd* [2023] NSWSC 12.

contended that a holding DOCA was liable to be terminated under s 445D(1)(g) of the *Corporations Act* on the basis that it was entered into for a wrongful purpose, to avoid the operation of s 32B of the SOPA which provides that a company in liquidation cannot serve or enforce a payment claim, or alternatively that the Court should stay the payment claim as an abuse of process. Ball J had that the DOCA was properly executed, in accordance with the voluntary administrator's opinion and by reference to matters that creditors were properly entitled to consider, and it had the consequence that the company was not in liquidation and s 32B of SOPA did not apply. That approach will likely encourage the entry into holding DOCAs in order to preserve the opportunity to serve a payment claim, and raises a practical difficulty for the recipient of that claim, which may be required to pay in response to that claim, but remains exposed to the risk that the company will later be placed in liquidation and it will be left to prove for any recovery of that claim in the liquidation. An appeal has been brought from that decision.

The Arrium appeal

In *Anchorage Capital Master Offshore Ltd v Sparkes (No 3); Bank of Communications Co Ltd v Sparkes (No 2)* [2021] NSWSC 1025 (Ball J), appeal dismissed in *Anchorage Capital Master Offshore Ltd v Sparkes* [2023] NSWCA 88, several lenders brought claims against, inter alia, the chief financial officer and group treasurer of Arrium Ltd, which had been placed in voluntary administration and then passed to liquidation. The lenders sought to recover loss which they claimed to have suffered as a result of incorrect representations contained in drawdown notices issued by Arrium that were repeated at the time of drawdown of the relevant facilities. Parallel claims brought by Arrium's liquidators had settled prior to judgment.

The Arrium Group was a substantial listed company with mining and steel manufacturing operations. It had, since about June 2015, been undertaking a strategic review, addressing how to repay debt of $1.125 billion due that was to mature from July 2017 to December 2017 and had considered possibilities including asset sales, refinancing, recapitalisation or debt restructuring. It issued several drawdown and rollover notices under loan facilities in January and February 2016, while that review was continuing, and each drawdown and rollover notice represented that it was solvent at each drawdown date. It then entered into voluntary administration several months later in April 2016, shortly after its lenders had indicated a lack of confidence in its management.

The question of solvency was considered at a group level in that case because of cross-guarantees given by the companies within the Arrium Group (as defined). Section 95A of the *Corporations Act* establishes the statutory test for insolvency. That section provides that a person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable; and a person who is not solvent is insolvent.

At first instance, Ball J but did not accept (at [264]ff) the lenders' contention that that "a company will also be insolvent if it can be said, on the balance of probabilities, that the company is not able to repay a debt falling due on some future date." In rejecting that proposition, his Honour observed (at [265]) that the question whether, from a particular date, Arrium was unable to pay its debts as they became due is one of fact not likelihood and that the civil

standard applied to proof of that fact, not to what was to be proved (ie the fact of insolvency). His Honour also identified (at [266]) a separate question, namely:

> "The other thing the Court is concerned with is what facts are relevant to the question of solvency and, in particular, how the Court should deal with future events in assessing the question of solvency. In the present case, the assessment the Court must make is whether it can be said that as from 7 January 2016 Arrium was unable to pay a debt falling due in July 2017. That is not a question of fact in the normal sense. It involves a prediction based on what was known and knowable as at 7 January 2016. In order to make that prediction – that is, in order to be able to say as at 7 January 2016 Arrium could not pay a debt falling due in July 2017 – there needs to be a high degree of certainty that that state of affairs would come about on the basis of the facts known or knowable at the earlier date. Otherwise, it is not possible to say that as at 7 January 2016, Arrium was unable to pay debts falling due in July 2017. At most all that could be said is that it was unlikely that Arrium would be able to pay debts falling due in July 2017. But that is equivalent to saying that Arrium was likely to become insolvent, not that it was insolvent, from 7 January 2016 on."

His Honour also held that the lenders, in seeking to establish insolvency, needed to establish that Arrium's bank lenders would not roll over the existing facilities or make further loans to Arrium in July 2017, rather than the Arrium officers having to establish the availability of such refinancing. His Honour then found that it would be expected that, in the normal course of events, Arrium could sell assets or raise finance on the security of those assets to repay its facilities falling due in July 2017; his Honour noted, in particular, the prospect of a successful sale of the Arrium Group's mining consumables business prior to July 2017 and for cost savings within the business, and held that it was not established that, in January and February 2016, it was more likely than not that Arrium would be unable to raise sufficient funds to repay the facilities due in July 2017 or would run out of cash prior to that date so as to prevent a sale of its mining consumables business. His Honour also noted that the fact of insolvency at an earlier point in time could not be established by hindsight in that case, including by reference to the fact that Arrium was placed in voluntary administration in April 2016, after its lenders then indicated a lack of confidence in its management.

The Court of Appeal upheld Ball J's finding that Arrium was not insolvent in January or February 2016, in the absence of any of traditional indicia of insolvency; held that Ball J had not erred in distinguishing between proof of present insolvency and the position where a company may be unable to pay a future debt when it fell due; and recognised (at [257]) that Arrium's appointment of voluntary administrators did not establish insolvency, where they could be appointed where a company was likely to become insolvent at a future time. A misleading and deceptive conduct claim also failed, where the Court of Appeal held that Arrium was not insolvent, and the solvency representation was not false (at [263]).

The plaintiffs' negligence claim also failed at first instance. The Court of Appeal held (at [268]ff) that Ball J had not erred in finding that the Arrium executives did not owe a duty of care to lenders, and distinguished the relationship of borrower and lender from that of professional and its client and

held that Arrium did not owe a duty of care to the lenders in respect of the drawdown notices, where the lenders were not vulnerable to it and placed limited reliance on it; second, the relationship of lender and borrower was inherently adverse; and, third, a commercial lender had the ability to take protective steps for itself. The Court also found that the lenders had not established reliance on the drawdown notices, where they knew that Arrium's financial position was deteriorating at that time.

The Court of Appeal also upheld Ball J's finding that neither Arrium's chief financial officer nor its group treasurer was jointly liable with Arrium for a breach of duty or as accessory to that breach. The Court of Appeal held (at [293]ff) that, unless a personal duty of care was established, a director, officer or employee was not liable in tort for an act that gave rise to liability on the part of the company, unless he or she was "so personally involved in directing or precuring the tort as to "make it his or her own" tort". The Court of Appeal also held (at [330]ff) that the executives were not shown to be accessories to a misleading representation, which would have required actual knowledge of the falsity of the representation. The Court of Appeal observed (at [370]-[371]) that the question whether a director or employee would be treated as personally liable for a representation would depend on whether the recipient would reasonably regard the representation made by the director or employee as well as by the company, and there was no error by Ball J in finding that neither the chief financial officer nor treasurer had personally engaged in misleading and deceptive conduct even if the representations were false.

Finally, the Court of Appeal held (at [394]ff) that the lenders' reliance on the fact of the drawdown notice was not efficient to establish causation, or that the representations made to them have caused loss, without reliance on the truth of the relevant representations.

Ipso facto clauses

The *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act* 2017 (Cth) introduced a stay on the use of ipso facto clauses to amend or terminate contracts with a company that is placed in voluntary administration. The scope of that stay, in s 451E of the *Corporations* Act, was considered by O'Bryan J in *Rathner, in the matter of Citius Property Ltd (admins apptd)* [2023] FCA 26. His Honour held, consistently with the terms of the section, that a counterparty cannot exercise a contractual right of termination by reason of a company's entry into administration or its financial position during the period of that administration and, where an administration ends in a company's liquidation, that stay continues to operate until that liquidation is complete. However, his Honour confirmed that this section does not operate to prevent a counterparty from relying on a separate contractual right arising from a company's entry into liquidation, even if that liquidation occurs after an administration, or from any failure of the company to perform its contractual obligations.

Priorities under s 561 of the Corporations Act

Section 561 of the *Corporations Act* deals with priority of employee claims over circulating security interests. I recently considered its scope in *Re BCA*

National Training Group Pty Ltd (in liq) [2023] NSWSC 366, which may be appealed and as to which I make no further comment.

In *Resilient Investment Group Pty Ltd v Barnett & Hodgkinson as liquidators of Spitfire Corporation Ltd (in liq)* [2023] NSWCA 118, the Court of Appeal dealt with a complex question as to whether a security interest over tax offset refunds relating to research and development expenditure was a "circulating security interest" for the purposes of s 561 of the *Corporations Act*. The answer to that question depended on whether the tax refunds were a "circulating asset" for the purposes of s 340 of the *Personal Property Securities Act* 2009 (Cth) and that depended on whether those amounts were a "monetary obligation" that "arises from" providing services "in the ordinary course of a business providing services of that kind". The majority in the Court of Appeal (Gleeson JA with whom Brereton JA agreed, White JA not deciding) held that the relevant tax offset refunds were not an "account", and therefore not a "circulating asset" because relevant provisions of the tax legislation did not impose an obligation on the Commissioner of Taxation to pay a refund to the taxpayer at the end of an income year. The Court also held that, in the particular circumstances, the entitlement to a tax offset refund in respect of research and development expenditure did not arise in the ordinary course of the company's business of providing financial platform services. A second aspect of that decision may be of wider application, where the Court upheld the previous approach to determining the "true employer" of employees in a company in insolvency cases, by application of principles of agency, notwithstanding three recent High Court decisions which arguably adopt a narrower approach to questions of construction of employment agreements.

Pooling orders

Part 5.6 Div 8 of the *Corporations Act* deals with pooling orders within a liquidation. A liquidator or liquidators of a group of companies may make a pooling determination if each company in a corporate group is being wound up and any of several specified conditions are satisfied, namely that: (1) each company in the group is a related body corporate of each other company in the group; or (2) apart from this section, the companies in the group are jointly liable for one or more debts or claims; or (3) the companies in the group jointly own or operate particular property that is or was used, or for use, in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group; or (4) one or more companies in the group own particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group.

A relatively straightforward case concerning pooling orders was considered by the Supreme Court of Victoria in *Re IMO Atlas Gaming Holdings Pty Ltd* [2023] VSC 91. Osborne J there made a pooling order in circumstances that several companies within a group shared property, staff and capital, so as to permit the proceeds of asset sales to be applied to debts of unsecured creditors of the group. On the other hand, the Full Court of the Federal Court, by majority, held that a polling order was not available in more complex circumstances in *McMillan Investment Holdings Pty Ltd v Morgan* (2023) 407 ALR 328; (2023) 164 ACSR 129; [2023] FCAFC 9. The majority reversed the

primary judge's decision that the pooling order should be made in respect of a claim to recover a payment made to an associated entity on the sale of a business. The majority held that the requirement, for a pooling order, that the property (relevantly, that claim) was used by the companies in the group in connection with their business, scheme or undertaking was not available, where that claim only arose on the receivers' sale of the relevant business. The liquidator has indicated an intention to seek special leave to appeal from the High Court.

Voidable transactions

Section 588FF of the *Corporations Act* specifies the orders that a court may make if a transaction is voidable under s 588FE of the *Corporations Act*, including as an unfair preference (s 588FA)[10], an uncommercial transaction of the company (s 588FB)[11], an unfair loan to the company (s 588FD), an unreasonable director-related transaction (s 588FDA) or a creditor-defeating disposition (s 588FDB). An application under this section may be made during the period beginning on the relation-back day (as defined in s 9) and ending on the later of 3 years after the relation-back day or 12 months after the first appointment of a liquidator in relation to the winding up of the company (s 588FF(3)(a)) or within such longer period as the court orders on an application by the liquidator brought within that period (s 588FF(3)(b))[12].

Preferences in respect of a running account

Turning now to running accounts, a single transaction is not a preference at general law if it forms part of a larger series of transactions, or running account, which do not confer a preference on a creditor, and the "ultimate effect" principle requires whether payment to a creditor to secure ongoing services from it is a preference to be determined by whether it results in a decrease in the net value of the other assets available for creditors.[13] Under s 588FA(3), transactions which are an integral part of a continuing business relationship between the company and a creditor, such as a running account, are treated as a single transaction; whether an unfair preference is being given is determined by reference to that single transaction; and the amount of any unfair preference is limited to the difference between the highest amount owing during the relevant period and the amount owing on the last day of the period.

Earlier cases permitted a liquidator bringing a preference claim to quantify the amount of a preference from the point of "peak indebtedness" during a continuing business relationship within the relation-back period. The New Zealand Court of Appeal rejected that approach in *Timberworld v Levin* [2015]

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[10] Recent unfair preference cases include *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd (in liq)* [2021] NSWSC 1692; *Re BBY Ltd (recs & mgrs apptd) (in liq)* [2022] NSWSC 29; *Re ZH International Pty Ltd (in liq)* [2022] NSWSC 2.

[11] Recent uncommercial transaction cases include *Cribb v Kingsbury (No 2)* [2021] FCA 1397; *Re ZH International Pty Ltd (in liq)* [2022] NSWSC 2; *Re Rococo Group Pty Ltd* (in liq) [2022] VSC 167; *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd (in liq)* [2021] NSWSC 1692.

[12] The operation of the limitation in s 588FF(3) was considered in *89 Burswood Road Pty Ltd v Harris and Kirman as liquidators of GHI Pty Ltd (in liq)* [2021] WASCA 178.

[13] *Richardson v The Commonwealth Banking Co of Sydney Ltd* (1952) 85 CLR 110 at 132; [1952] ALR 315; (1952) 25 ALJ 734; *Air Services Australia v Ferrier* (1996) 185 CLR 483; 137 ALR 609; *Kassem & Secatore v Commissioner of Taxation* [2012] FCA 152 at [32].

3 NZLR 365, and held that a corresponding section required all payments and transactions within a continuing business relationship to be netted off, rather than allowing a liquidator to exclude transactions prior to the point of peak indebtedness. In *Badenoch Integrated Logging Pty Ltd v Bryant, Re Gunns Ltd (in liq)* (2021) 284 FCR 590; (2021) 152 ACSR 361; [2021] FCAFC 64, the Full Court of the Federal Court took the same view and held that that section was directed to "the ultimate effect of the dealings between the parties" and to all payments and all supplies forming part of the continuing business relationship over the relevant period, and therefore excluded the "peak indebtedness" approach.

On appeal in *Bryant v Badenoch Integrated Logging Pty Ltd* (2023) 406 ALR 731; (2023) 163 ACSR 356; [2023] HCA 2, the High Court (in a judgment of Jagot J, with whom Kiefel CJ and Gageler, Gordon , Edelman, Steward and Gleeson JJ agreed) held that, where a continuing business relationship existed between a company and a creditor, the amount of the preference was to be assessed by reference to the period of that continuing business relationship within the six months ending on the relation-back day under s 588FE(2) of the *Corporations Act*, rather than by reference to the point of "peak indebtedness" in that six month period. That period will generally commence at the later of (1) six months prior to the relation back day or (2) the date when the continuing business relationship commenced in that six month period. That alteration is potentially disadvantageous to liquidators which could otherwise have relied on the "peak indebtedness" approach to maximise the amount of recovery available. The Court also noted that the question whether a payment was received as an integral part of a continuing business relationship would be determined objectively, by reference to evidence as to the parties' actual business relationship, and their intentions are relevant to, but not determinative of, that question.

Availability of set-off in response to preference claims

In *Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd v Metal Manufacturers Pty Ltd* (2021) 159 ACSR 115; [2021] FCAFC 228, the Full Court of the Federal Court considered the availability of set-off[14] in response to a preference claim, a matter which had largely been left open in previous decisions at first instance. The Full Court held that a creditor is not able to set-off an amount owed by an insolvent company to them against the amount of a preference claim against it, because there is a lack of mutuality between the company's indebtedness to the creditor and the liability of the creditor to repay an unfair preference in an action brought by a liquidator, for the benefit of unsecured creditors generally.

The High Court (in a joint judgment of Kiefel CJ and Gordon, Edelman and Steward JJ, with whom Gageler J agreed) affirmed that decision, substantially on the same basis, in *Metal Manufactures Pty Ltd v Morton* (2023) 406 ALR 711; 163 ACSR 336; [2023] HCA 1 and overruled earlier decisions which had recognised the possibility of a set off between the creditor's claim and a liquidator's preference claim in the liquidation. The Court held that, immediately prior to the commencement of the liquidation, a liquidator's unfair

[14] Section 553C(1) of the *Corporations Act* relevantly provides, in the case of mutual credits, debts or dealings between a company being wound up and its creditor, for automatic set-off.

preference claim against a creditor did not exist as to support a set-off and, second, the relevant dealings were not mutual, since one is between the creditor and the company and the other was for the benefit of persons entitled to payment under the statutory provisions for the proof and ranking of debts and claims in a liquidation, than for the benefit of the company.

Unreasonable director-related transactions (s 588FDA)

Section 588FDA provides that transactions between a company on the one hand, and a director or his or her close associate on the other, may be treated as voidable on a winding up of the company if they occur in circumstances where a reasonable person in the company's circumstances would not have entered into the transaction. In *Re Bryve Resources Pty Ltd* [2022] NSWSC 647, Williams J considered the scope of that section and followed Gleeson JA's decision in *Re IW4U Pty Ltd (in liq)* (2021) 150 ACSR 146; [2021] NSWSC 40 in holding that a payment is made for the benefit of a director, for the purposes of that section, if it "financially advantages the director, regardless of whether it is paid to a director or a close associate of the director". Her Honour also noted that the section required an assessment of whether the company's conduct was reasonable, objectively assessed by reference to all the company's circumstances. Her Honour held that no reasonable person would have made the relevant payments to reduce the director's debt where, although that would reduce the amount of the company's debt, it would then have insufficient funds to pay the debts of other creditors.[15]

"Phoenixing" transactions (s 588FDB)

A judgment in the Supreme Court of Victoria in *Re Intellicomms Pty Ltd (in liq)* [2022] VSC 228 has considered the prohibition on creditor-defeating dispositions (or, colloquially, "phoenixing" transactions) in s 588FDB of the *Corporations Act*. A disposition of property of a company is a creditor defeating disposition within s 588FBD(1) if (1) the consideration payable to the company for the disposition was less than the lesser of (i) the market value of the property or (ii) the best price that was reasonably obtainable for the property, having regard to the circumstances existing at that time the relevant agreement (as defined in s 9) for the disposition was made or, if there was no such agreement, at the time of the disposition; and (2) the disposition has the effect of preventing the property from becoming available for the benefit of the company's creditors in the winding up of the company; or hindering, or significantly delaying, the process of making the property available for the benefit of the company's creditors in the winding up of the company. Section 588FDB(2) extends the concept of a creditor defeating disposition to the position where a company does something that results in another person becoming the owner of property that did not previously exist; and, under s 588FDB(3), if a company makes a disposition of property to another person and the other person gives some or all of the consideration for the disposition to a person other than the company ("third party), then the

[15] Other recent unreasonable director-related transaction cases include *Re Rococo Group Pty Ltd* [2022] VSC 167; *Re ACN 152 546 453 Pty Ltd (in liq)* [2022] NSWSC 974; *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd (in liq)* [2021] NSWSC 1692; and *Aviation 3030 Pty Ltd (in liq) v Lao* [2022] FCA 458.

company is taken to have made a disposition of the property constituting so much of the consideration as was given to the third party.

The transaction in issue in this case was the sale of Intellicomms' business assets to another company, whose sole director and shareholder was the sister of Intellicomms' director and a former employee of Intellicomms, immediately before Intellicomms was placed in creditors' voluntary liquidation by its sole director without notice to a major creditor and its shareholders. Gardiner AsJ observed that the sale agreement had:

> "all the hallmarks of a classic phoenix transaction, i.e., it involves the transfer of the assets of an insolvent enterprise to an entity controlled by persons closely associated with it, leaving behind significant liabilities with no means to satisfy them."

Gardiner AsJ found that the sale was within the scope of s 588FDB where it took place for less than the market value or best price reasonably obtainable for the business, since a major creditor had expressed interest in acquiring the business at a higher price, albeit after it became aware of the sale of the asset. His Honour found that other matters which supported a finding of breach of the prohibition included the circumstances of the sale; the lack of an explanation why it was necessary to sell the business prior to voluntary liquidation rather than leave a liquidator to do so; the fact that the director had not used the voluntary administration regime to allow an orderly sale by the administrator; the fact that the director obtained several valuations of the business, on increasingly pessimistic bases, before selling it at the lowest of those valuations; and the fact that the sale had not been exposed to the open market. This is a relatively straightforward application of this section, in circumstances that might also have allowed the transaction to be set aside as an uncommercial transaction.