



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

B19/2022

BETWEEN:

METAL MANUFACTURERS PTY LIMITED
(ACN 003 762 641)

Appellant
and

10 **GAVIN MORTON AS LIQUIDATOR OF MJ WOODMAN ELECTRICAL
CONTRACTORS PTY LTD (IN LIQUIDATION) (ACN 602 067 863)**

First Respondent

MJ WOODMAN ELECTRICAL CONTRACTORS PTY LTD (IN LIQUIDATION)
(ACN 602 067 863)

Second Respondent

RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

20 This submission is in a form suitable for publication on the internet.

Part II: Propositions to be Advanced in Oral Argument

1. **(Approach of the Full Court)** As a matter of general approach, there are noticeable differences between the analysis adopted by the Full Court and the analysis advanced by the Appellant. In particular, the Full Court was rightly concerned: (a) to seek to construe the statutory insolvency provisions as a coherent whole, with a view to allowing each component of this legislative scheme to achieve its purpose; (b) to seek to identify the legislative purposes of each component of this legislative scheme, with a view to considering whether they may operate together harmoniously; (c) to consider the extent to which the terms of the statute have been given a purposive interpretation; (d) to test the appropriateness of possible constructions by reference to their consequences; and (e) to give due regard to the absence of any support for the approach which is advanced by the Appellant, in the pre-1992 caselaw or in the extensive extrinsic materials which led to the 1992 reforms.
 2. **(Key Steps in the Reasoning)** Given the narrower focus of the Appellant's approach, it is important not to lose sight of the key steps in the Full Court's reasoning. There are essentially eleven steps: (1) the statutory scheme is fundamentally based upon a principle of equality of distribution – so that all available assets are distributed to meet valid unsecured claims in accordance with a statutory order of priority, and in the event of a shortfall, on a *pari passu* basis; (2) the set-off provision has the purpose of enhancing the fairness of this approach, by recognizing that claimants who are subject to cross-claims
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may, in substance, be no different to claimants with a simple monetary claim against the company, and so should be treated in the same way; (3) to give effect to this purpose, a statutory test of “mutuality” has been adopted, which is to be applied in a purposive way; (4) this requires mutuality to be tested, as a matter of substance, by reference to a number of criteria of reciprocity, including timing, the identity of the relevant parties, and whether the benefit and burdens upon each party are held in the same interest; (5) the effectiveness of this scheme for equality of distribution is protected by the preference provisions, whose purpose is to restore to the estate a defined category of pre-liquidation disbursements; (6) the key features of this right of action are that: (a) it does not arise from rights or obligations which existed prior to liquidation, (b) it arises only upon liquidation and is vested in the liquidator as a statutory officer (not as agent of the company), (c) the action is not brought in the interests of the company (whose interests may be subject to rights of secured creditors), but in the interests of those who have a valid entitlement in the statutory scheme of distribution, (d) it is only upon the successful outcome of these proceedings that the company obtains any rights, by virtue of a court order; and (e) these rights are limited to receiving the restorative payment for the purpose of distribution to the parties entitled under the scheme of distribution; (7) a claim with these characteristics is not subject to statutory set-off under the terms of the statute (eg. s588FI); (8) this analysis gives harmonious effect to all relevant components of the statutory insolvency provisions; (9) this analysis avoids an arbitrary outcome which undermines the purpose of the preference provisions; (10) this analysis also reflects a long-standing approach to this issue, which was not sought to be changed in the comprehensive review which led to the 1992 reforms; and (11) this analysis is not affected by lines of authority concerning other causes of action vested in liquidators arising from pre-liquidation obligations.

3. **(Meaning of Mutuality)** The Full Court was correct to conclude that, applying a purposive test: (a) the focus is upon rights held by the company (not rights held by the liquidator as a statutory officer); (b) the focus is upon rights which the company held prior to the date of liquidation (even if contingent), which are properly characterized as the source of the relevant monetary cross-demand; and (c) the focus is upon rights which the company holds in the same interest as its cross-obligations, so that the set-off does not distort the position of those in whose interests the relevant claim is brought. As the test is one of substance, the “interests” to be considered include those created by statute, just as much as those which are created by arrangements recognized in equity.

4. **(Mutuality of Interest?)** The Full Court was correct to find no mutuality of interest in the present case because: (a) the relevant party to be considered is the company; (b) the only relevant right enjoyed by the company is one which would arise when a court order is made in its favour under s 588FF; (c) under the statutory framework, that right would not be held by the company as part of its general assets (eg subject to charges), but solely for the purpose of providing further funds to those entitled under the statutory distribution scheme so as to reverse a distortion in that scheme; and (d) the fact that these funds are not held, in equity, on a trust does not affect this analysis.

10 5. **(Mutuality of Timing?)** The Full Court was correct to find no mutuality of timing in the present case because: (a) the relevant time to be considered is the position before the date of liquidation; (b) at that time, the company was lawfully obliged to pay its debts and the creditor was lawfully entitled to receive these payments; (c) it was only after liquidation, when a statutory distribution scheme arose, that a right of action came into existence for the recovery of preferences; (d) even then, this right of action vested in the liquidator (not the company) and only entitled the liquidator to seek an order under the power conferred on the court by s 588FF; and (e) it was not until such an order is made that the company would have any rights at all.

20 6. **(Legal Context)** The set-off which is sought to be advanced is not a new issue in insolvency. Prior to 1992, there was simply no support in the caselaw for the existence of such a right of set-off in preference cases. The contrary position was “tolerably clearly accepted”. In the 1992 reforms, there was no suggestion that this position should be changed. The Full Court’s analysis of the caselaw and the extrinsic materials is accurate.

7. **(Other Categories of Case)** The other categories of case relied upon by the Appellant do not assist as: (a) one group relates to claims arising from breaches of statutory duties which arose prior to liquidation (eg s 588G), which are expressly stated to constitute a debt due to the company (eg s 588M), and which may benefit secured creditors (s 588Y); (b) the remaining authorities simply do not address the issues considered by the Full Court.

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