SUPREME COURT OF QUEENSLAND

CITATION:	*Mine & Quarry Equipment International Ltd v McIntosh (as liquidator of) Mine & Quarry Equipment Pty Ltd (in liq)* [2005] QCA 186
PARTIES:	**MINE & QUARRY EQUIPMENT INTERNATIONAL LTD** ARBN 079 139 683 (applicant/appellant) **v** **LACHLAN STUART McINTOSH as liquidator of MINE & QUARRY EQUIPMENT PTY LTD (in liquidation)** ACN 011 012 561 (respondent/respondent)
FILE NO/S:	Appeal No 10625 of 2004 SC No 2869 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2005
JUDGES:	McPherson JA, Atkinson and Mullins JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against the decision of Wilson J given on 8 November 2004 dismissed with costs**
CATCHWORDS:	CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF LIQUIDATION – PROOF AND RANKING OF CLAIMS – MUTUAL CREDITS AND SET-OFF – money owed to creditor admitted to proof in winding up – interlocutory application seeking declaration that liquidator not entitled to set-off against sum admitted to proof – whether liquidator complied with appropriate statutory procedure for set-off – whether creditor informed in writing of the grounds for the amendment by reducing the claim as required by reg 5.6.55 *Corporations Regulations* 2001 (Cth) *Corporations Act* 2001 (Cth) s 471B, s 553C *Corporations Regulations* 2001 (Cth) reg 5.6.39, reg 5.6.47(4), reg 5.6.48(4), reg 5.6.55, reg 5.6.63, reg 5.6.65, reg 5.6.68

Algoni Pty Ltd v Secretary, Department of Industrial Relations (1985) 3 NSWLR 515, considered
Langley Constructions (Brixham) Ltd v Wells [1969] 1 WLR 503, considered
Mersey Steel & Iron Company v Naylor Benzon & Co (1882) 9 QBD 648, considered
Mersey Steel & Iron Co v Naylor Benzon & Co (1884) 9 App Cas 434, considered
Mine & Quarry Equipment International Pty Ltd v Clout [2001] QSC 412; Appeal No 2869 of 2001, 31 October 2001, cited
Mine & Quarry Equipment International Ltd v McIntosh & Robson [2005] QSC 059; SC No 2869 0f 2001, 24 March 2005, cited
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589, cited
Re Canada Western Steel Co (1922) 69 DLR 689, cited

COUNSEL: P J Dunning for the appellant
A M Daubney SC for the respondent

SOLICITORS: Hopgood Ganim for the appellant
Tucker & Cowen for the respondent

[1] **McPHERSON JA:** Mine & Quarry Equipment Pty Ltd (which is referred to here as the Company) was ordered to be wound up on 10 July 2000. In happier days it was a repairer, seller and broker of mining or quarrying equipment. In business it was associated with another company Mine & Quarry Equipment International Ltd, referred to here as International. In the winding up of the Company, International on 4 September 2000 lodged a claim for an amount of $1,262,930.00, of which $627,954.46, being for loans and interest owing by the Company, was admitted to proof by the liquidator on 8 March 2001. The balance of this proof amounting to $634,975.60 was rejected by the liquidator, who also rejected a second proof of debt lodged on 7 December 2000 for amounts totalling $581,616.67. The second proof has no present relevance except to differentiate it from the first.

[2] International appealed against the liquidator's rejection of the first of these proofs of debt. The appeal came before Atkinson J in the Supreme Court who, after hearing oral evidence and making findings based on credibility, dismissed the appeal in reasons delivered by her Honour on 31 October 2001: *Mine & Quarry Equipment International Pty Ltd v Clout* [2001] QSC 412. This left International with its claim for $627,954.46, which the liquidator had admitted to proof on 8 March 2001. On 3 June 2002, solicitors for the liquidator wrote a letter to solicitors for International that is the subject of the determination of 8 November 2004 by Wilson J in proceedings from which this appeal is arises. Those proceedings were initiated by an interlocutory application in the winding up made by International seeking a declaration that the respondent liquidator was not entitled to set off an amount of $85,989.62 against the sum admitted to proof of $627,954.46. The amount of $85,989.62 claimed by the liquidator is made up principally of a series of unpaid invoices which were rendered by the Company to International for work done or goods supplied by it to International in the course of their business relationship.

[3] Before Wilson J, International relied on three matters of law to challenge the liquidator's decision. One was that, having admitted International's proof of debt for $627,954.46, the liquidator was not at liberty to change his mind and later assert a set-off against it. Another was that, by reason of the decision in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, the liquidator was estopped from raising a set-off which should have been pursued at the earlier hearing before Atkinson J. Neither of these two matters is now pursued on this appeal, leaving only the third, which concerns the form and efficacy of the liquidator's decision to assert the set-off which he sets up.

[4] Before considering that question, it is I think helpful to refer to the position as it would have been if, instead of claiming in the winding up a set-off in respect of the sum of $85,989.62, the liquidator had simply set the Company in motion to recover that debt from International by bringing action for it in the ordinary way. In those circumstances International would, in order to defeat the action or reduce the amount of it, have been forced to plead its own claim, already admitted to proof for $627,954.46, by way of defence to the amount claimed by the Company. As it considerably exceeds the total being claimed by the Company through its liquidator, it might also have been expected to put forward a counterclaim for the balance by which its own claim for $627,954.46 exceeded that of the Company by its liquidator.

[5] The decision in *Mersey Steel & Iron Company v Naylor Benzon & Co* (1882) 9 QBD 648 seemed at the time it was decided to suggest that, in respect of that excess, leave of the court would not be required to pursue the counterclaim against an insolvent company in liquidation; but that impression of the decision has since been dispelled by *Langley Constructions (Brixham) Ltd v Wells* [1969] 1 WLR 503, which effectively confined the right to counterclaim without leave to setting off by way of defence no more than the amount claimed against it in the action brought by the company. The purpose of provisions like s 471B of the *Corporations Act 2001* requiring leave to proceed against a company in winding up is to ensure that claims of that kind by creditors are kept within the "winding up workshop", as it was called in a Canadian case some time ago: *Re Canada Western Steel Co* (1922) 69 DLR 689. The object is, where possible, to reduce costs by disposing of claims against a company in liquidation by the procedure of proof in winding up rather than by litigation in the ordinary way.

[6] The decision of the Court of Appeal in *Mersey Steel & Iron Company v Naylor Benzon & Co* (1882) 9 QBD 648, at 664, 666, 671, continues to stand as authority for the proposition that, no matter how the question is raised or by whom, the set-off required by the legislation governing insolvent companies applies generally within the limits defined in its provisions. The set-off takes place automatically: *Gye v McIntrye* (1991) 171 CLR 609, 622. The legislation is now represented in Australia by s 553C(1) of the *Corporations Act 2001*; but, despite some verbal alterations in form, it continues to give effect to the well known "mutual dealings" provision limiting proof in winding up to the "balance" after taking an account of what is due from one party to the other: *Re GM & AM Pearce & Co Pty Ltd v RGM Australia Pty Ltd* [1998] 4 VR 888, 896-897. It is true that it is predicated on there being "a person who wants to have a debt or claim admitted against the company", just as in its original form the section spoke of "a person proving or claiming to prove". But, for reasons given in the *Mersey Steel* case, the set-off mandated by the legislation prevails, as Lindley LJ said of it in that case (9 QBD at 667), "whether an action is

brought by a company, or a proof is carried in by a creditor of the company in winding up". The speeches on the other issue in the ensuing appeal to the House of Lords in that case have perhaps tended to overshadow the judgments on this point in the Court of Appeal; but their Lordships affirmed the decision below in all respects, Lord Selbourne LC remarking that the view taken in the Court of Appeal of the corresponding provision in s 10 of the Judicature Act 1875 (Eng) was "the right way of looking at the matter": *Mersey Steel & Iron Co v Naylor Benzon & Co* (1884) 9 App Cas 434, at 441-442. None of this is contentious.

[7] The question may be asked, What this has to do with any of the three points mentioned earlier in the reasons? The answer is that it demonstrates the insignificance from a practical standpoint of the third submission advanced by International below and as appellant in this Court. The result would have been the same if, instead of setting off against International's proof, the liquidator had sued for the amount of the indebtedness: *Stein v Blake* [1996] AC 243, 253. The *Corporations Regulations* embody the familiar procedure to be followed in dealing with proofs of debts or claims. By reg 5.6.39 the liquidator fixes a date by which particulars of claims are to be submitted and gives public notice of it. A claim may be admitted without formal proof, but must not be rejected without notifying the creditor of the grounds of rejection and requiring a formal proof to be submitted: reg 5.6.47(4). Eventually, the liquidator fixes and advertises or notifies a date by which creditors whose claims have not been admitted are formally to prove their claims, or be excluded from the benefit of a distribution made before admission of that claim: reg 5.6.48(4). There is material in the record before the Court that this stage was here reached by the liquidator of the Company in about August 2004. It does not greatly matter for present purposes because the question on the appeal is concerned with the process of amending a proof already admitted and with the operation of the legislation permitting this to be done.

[8] Amending a proof is dealt with by reg 5.6.55, which is directed to cases where the liquidator considers that a proof of debt or claim has been wrongly admitted: reg 5.6.55(1). In that event, the liquidator may either (a) revoke the decision to admit the proof and reject all of it; or (b) "amend the decision to admit the proof by increasing or reducing the amount of the admitted debt or claim": reg 5.6.55(3). In doing so he must in writing inform the creditor by whom it was lodged of his or her grounds for the revocation or amendment: ibid.

[9] International submits that the liquidator failed to comply with this procedure in the present instance. What he or his predecessor did was by his solicitors to send the letter dated 3 June 2002 (which was some seven months after the decision of Atkinson J dismissing the appeal from rejection of the other proofs or parts of proofs) to solicitors for International. The letter is headed **Mine & Quarry Equipment Pty Ltd (In Liquidation) - Set-off Claims against MQEI**. The body of the letter begins by saying "with respect to the abovementioned liquidation, our client now needs to finalise some matters prior to payment of an interim dividend in the administration". It then notes that International's claim has been admitted to proof in the sum of $627,954.46, adding however that "This claim is subject to any set-offs owed to the liquidator or [the Company]". The letter refers to further claims by International made in correspondence, which "have been rejected" without an appeal being taken against those decisions pursuant to s 1321 of the Act.

[10] Under the sub-heading **Set-off - Costs** the letter then discusses International's indebtedness in the sum of $28,500.00 for costs in the Supreme Court of the proceedings on 31 October 2001 and a further $15,000 for the costs of an abandoned appeal against that order. It advises the liquidator's intention to set those amounts off against the proposed dividend payment in the winding up. It then proceeds to discuss **Other Claims** dealing *seriatim* with various numbered invoices for work done or goods supplied by the company, giving brief descriptions of the contents, saying that the particular amount is in each case due by International to the Company and that it "will be set-off against your client's dividend". Finally the letter summarises the amounts due, totals them at $85,989.62, and states that International's claim will be "assessed for a dividend on the amount of $541,964.84 (by $627,000 less $85,898.62)".

[11] As Wilson J pointed out in her reasons, there seems to be a slight imprecision in some of these figures; but the meaning of the letter is clear. The liquidator was proposing to give effect to the set-off which s 553C enjoins by reducing the amount of the admitted proof by the total sum of $85,898.62, which he was planning to do by deducting it from the interim dividend or distribution that would otherwise have been paid to International. It is true that the letter does not in the precise words of reg 5.6.55(1) say that the liquidator "considers that a proof of debt or claim has been wrongly admitted", or that he intends to "amend the decision to admit the proof by … reducing the amount of the admitted debt or claim"; but that is clearly the effect of what he says he proposes to do in setting off the sum of the claims discussed in the letter of 3 June 2002 and reducing the dividend payable accordingly.

[12] As has been seen, reg 5.6.55(3)(b) requires that, if the liquidator amends a decision to admit a proof "by reducing the amount of the admitted debt or claim", the liquidator must in writing inform the creditor of "the grounds" for the amendment. This the letter did by explaining that each of the items identified was being set off, specifying reasons why the entitlement to do so was said to arise in the case of each item. It is true that reg 5.6.55 was not as such referred to, but the Regulations do not require it to be. It is not suggested that International was misled by that omission. In the correspondence with International's solicitors that ensued in which the competing contentions are canvassed, the parties adverted to s 553C of the *Corporations Act*. In their letter in reply of 12 June 2002, International's solicitors themselves specifically "reminded" the liquidator's solicitors that "the question of set-off is governed by s 553C of the *Corporations Act*". It was then that they raised the other two arguments that the liquidator was, having admitted the proof for $627,954.46, not entitled to set off against it; and that on the *Anshun* principle it ought to have been done when the amount of the proof was previously in issue before Atkinson J. Those were two matters determined by Wilson J against which the present appeal is not now being pursued.

[13] On behalf of International Mr Dunning of counsel referred to *Algoni Pty Ltd v Secretary, Department of Industrial Relations* (1985) 3 NSWLR 515, in which Kirby P considered a statutory obligation to provide "grounds" for a decision. His Honour, with the concurrence of Hope and Glass JJA, said (at 525) that the word "grounds" normally connotes "something more informal and more abbreviated" than reasons; and (at 526) that the "grounds" supplied "must … provide sufficient information to ensure that issue may be joined" on an appeal against the decision "in an efficient and rational way". Having previously appealed to the Supreme Court against the liquidator's earlier decision to reject its proofs of debt,

International was on this occasion perfectly conscious of the right of appeal conferred on it by s 1321 of the *Corporations Act*. The letter of 3 June 2002 furnished it with sufficient information to enable it to appeal against the liquidator's decision to set-off if that was what International was minded to do.

[14] In the end, what is contended for here by the appellant is an excessively literal and narrow interpretation of reg 5.6.55 in so far as it relates to amending a proof of debt, already admitted, by reducing its amount. It was submitted that the letter of 3 June 2002 did not, in terms of reg 5.6.55(1), state that the liquidator considered that International's proof of debt had been wrongly admitted or that his decision to admit it was being amended. It was said that the liquidator had not even sworn to having formed such a decision. But a liquidator, in carrying out his duties in a winding up by the court, acts as its officer, and, unless positively challenged, the Court acts on the assumption that he is to be trusted in what he does, in the same way as it does in respect of others, like the Court Registrar, who carry out duties as the Court's officer or delegate. The letter of 3 June 2002, while as Wilson J remarked in her reasons it is not perfect, made it sufficiently clear that the liquidator had decided to set off the amounts claimed against International and accordingly to amend by reducing the amount of the admitted proof of $627,954.46 to the extent of $85,898.62. As is shown by the subsequent correspondence between the solicitors, International was under no illusion that it had been informed of the liquidator's intention in that behalf, and, indeed, it took issue about his power to do so.

[15] It may be that the provisions of the *Corporations Regulations* do not precisely provide for circumstances like these, where, as appears from the correspondence, there may also have been factual disputes about the existence of the debts, or some of them, being set off. However, the letter dated 13 June 2002 from the liquidator's solicitors advised that the liquidator was "prepared to investigate the factual matters to determine the validity of such set-off claims", and invited a quick response on those questions. The correspondence between them continued relentlessly on, apparently in part because the only effective director of Intentional was involved in matrimonial proceedings in the Family Court, in the course of which distributions made by the liquidator of the Company were impounded to answer his wife's claims in those proceedings. Eventually, the liquidator gave notice in accordance with reg 5.6.65 of his intention to declare a dividend, and later a final dividend, by the date or dates specified in formal notices which he gave. Failing to submit a formal proof by the date so specified has the effect, subject to reg 5.6.68, of excluding that creditor from participating in the distribution to which that notice relates: reg 5.6.65(3). By reg 5.6.63 a dividend in winding up may be paid only to a creditor whose claim has been admitted by the liquidator at the date of distribution of dividends. Although the regulation does not specifically say so, it must, in the context of the Regulations as a whole and in particular those in reg 5.6.55, necessarily refer to and include a claim of which the amount has been amended by the liquidator pursuant to the Regulations. Again, the reference in reg 5.5.63 must mean to include a proof as admitted after amendment by the liquidator under reg 5.6.55, which in this instance reduced its amount from $627,954.46 by $85,989.62.

[16] Although a winding up by the court is always an "ongoing" thing until all the corporate assets are properly distributed by the liquidator, a time must come when no further claims by creditors will be entertained. Otherwise finality would never be achieved. We were informed by the appellant that on 3 December 2004, International had applied for an extension of time within which to appeal against the

decision conveyed by his solicitors' letter of 3 June 2002 to amend the proof by reducing it in amount because of the set-off claimed by the liquidator. The application was refused by McMurdo J for reasons delivered on 24 March 2005: *Mine & Quarry Equipment International Ltd v McIntosh & Robson* [2005] QSC 059. We were not told that any appeal against that decision has been instituted. To all things, even winding up, there must be an end.

[17] In my view, there is no substance in the submissions advanced by Mr Dunning on this appeal. I would dismiss with costs the appeal against the decision of Wilson J given on 8 November 2004.

[18] **ATKINSON J**: I agree with the reasons for judgment of McPherson JA and the orders proposed.

[19] **MULLINS J:** I also agree with the reasons for judgment of McPherson JA and the orders proposed.