

SUPREME COURT OF QUEENSLAND

CITATION: *Greig & Anor v Deputy Commissioner of Taxation & Anor*
[2011] QSC 129

PARTIES: **DEPUTY COMMISSIONER OF TAXATION**
(first applicant)
COMMISSIONER OF TAXATION
(second applicant)
v
**JOHN LEITHBRIDGE GREIG AND NICHOLAS
HARWOOD AS LIQUIDATORS OF EXTREMCO PTY
LTD (IN LIQUIDATION)**
ACN 070 554 406
(respondents)

FILE NO: SC No 9265 of 2010

DIVISION: Trial Division

PROCEEDING: Application on the papers

DELIVERED ON: 23 May 2011

DELIVERED AT: Brisbane

HEARING DATE: Application on the papers; no oral hearing

JUDGE: Peter Lyons J

ORDER: **1. Pursuant to s 588FF of the *Corporations Act 2001* (Cth), the Defendants pay Extremeco Pty Ltd (in liq) ACN 070 554 406 the amount of \$390,657;**
2. Each party bear their own costs of and incidental to the proceedings.

CATCHWORDS: CORPORATIONS — WINDING UP — CONDUCT AND INCIDENTS OF WINDING UP — EFFECT OF WINDING UP ON OTHER TRANSACTIONS — OTHER CASES — where plaintiff liquidators sued the defendants for recovery of payments alleged to be liable to be set aside under section 588FA, 588FC or 588FE of the *Corporations Act 2001* (Cth) — where negotiations between the parties resulted in an agreement to settle — where a consent order brought pursuant to s 588FF was sought from the Registrar — where it was beyond the power of the Registrar to make the order — where an application on the papers for the consent order was made by the defendants — where applicants submitted that there was no dispute between the parties as to the facts — where applicants further submitted that the consent of the parties was sufficient to satisfy the court that the transactions were voidable under s 588FE — whether admissions made by the applicants provided sufficient evidence for the court to be satisfied that the transactions of the company were voidable — whether consent order should be made

Corporations Act 2001 (Cth), s 513C, s 588FA, s 588FC, s 588FE, s588FF

Dean-Willcocks (as liq of SJP Formwork (NSW) Pty Ltd (in liq)) and Anor v The Commissioner of Taxation (No 2) and Ors (2004) 49 ACSR 325, considered

SOLICITORS: Australian Taxation Office, Legal Services Branch for the applicants
Freehills for the respondents

- [1] **PETER LYONS J:** The plaintiffs are the liquidators of Extremeco Pty Ltd (*Extremeco*). They have sued the defendants for the sum of \$415,647 on the basis that a number of transactions are liable to be set aside under s 588FA, s 588FC, or s 588FE(2) of the *Corporations Act 2001 (Cth)* (*Corporations Act*). The transactions are alleged to have occurred between about 1 March 2007, and 31 August 2007.
- [2] In their defence, the defendants generally admitted the facts alleged by the plaintiffs. However, they did not admit that from 1 March 2007 Extremeco was insolvent. Nor did they admit the application of the sections of the *Corporations Act* previously mentioned. While the defendants admit receipt of the sums referred to in the statement of claim, they do not admit that the amounts were paid by Extremeco. With respect to one of the transactions (a payment of an amount of \$25,000 on 2 August 2007) the defendants did not admit that they received more than they would have received in the winding up of Extremeco, on the ground that this payment was made in respect of superannuation liabilities. However, they made admissions in respect of the other payments alleged by the plaintiffs.
- [3] There have been negotiations between the parties, resulting in an agreement to settle the matter on the basis that the defendants pay the sum of \$390,657 (with each party bearing its own costs). That sum approximates the amount claimed, less \$25,000.
- [4] A consent order was sought from the Registrar, but was not granted, on the basis that it was beyond the power of the Registrar to make an order in a proceeding brought pursuant to s 588FF of the *Corporations Act*.
- [5] That has resulted in an application by the defendants for judgment for the agreed amount against them, on the papers and without an oral hearing. The submissions in support of that application included a submission that there was no dispute between the parties as to the facts. They also included a submission that the consent of the defendants is sufficient to satisfy the court that the transactions are voidable. In support of the proposition that the consent of the defendants was sufficient to satisfy the court that the orders could be made, reference was made to *Dean-Willcocks (as liq of SJP Formwork (NSW) Pty Ltd (in liq)) and Anor v The Commissioner of Taxation (No 2) and Ors*.¹
- [6] In *Dean-Willcocks*, a liquidator had sought relief against 14 defendants under s 588FF of the *Corporations Act*. A condition of the Court's power to grant relief under that section is expressed by the words "where...a court is satisfied that a transaction of the company is voidable because of section 588FE...". Austin J

¹ (2004) 49 ACSR 325 at [27].

referred to a judgment of Finklestein J, *Crosbie v The Commissioner of Taxation*,² where, as Austin J noted, Finklestein J adopted a proposition to the effect that since s 588FF requires a court to be satisfied that a transaction of a company is voidable, the court cannot make an order under that section merely by consent, and without first examining the facts. With respect to that proposition, Austin J said:³

“In my opinion there is no general principle preventing a court from being ‘satisfied’ of the matters that it is required by statute to address before making orders, where there is an admission between parties; nor is there any principle requiring a court in those circumstances to undertake its own factual inquiry when the parties invite it to do no more than act upon their consent. That is not to say that the court should simply act on consent orders without any independent thought. There being no jurisdictional bar to acting on admissions under s 588FF, it is up to the court to consider, in the circumstances of the instant case, whether admissions are sufficient to warrant its being ‘satisfied’.”

- [7] The view of Austin J may be regarded as contentious.⁴ Nevertheless, it seems to me to be correct. The legislation confers on a court a power, conditioned on the court’s satisfaction. In doing so, it seems to me the legislature must be taken to accept the court as it finds it.⁵ That includes acceptance of the methods regularly used by courts to determine facts, one of which is that courts commonly act on the admission of facts by parties.⁶
- [8] However, although it was clear that the defendants were prepared to consent to the judgment, initially no evidence was presented of an admission by the defendants of some of the facts necessary to establish that any of the transactions was voidable because of s 588FE. Under that section, for present purposes, a transaction is voidable if it is an insolvent transaction of the company, and it was entered into or an act was done for the purpose of giving effect to it during the six months ending on the relation-back day.⁷
- [9] For the transactions in question to be insolvent transactions, they must each be either an unfair preference, or an uncommercial transaction; and the transaction must be entered into, or an act be done for the purpose of giving effect to the transaction, at a time when the company was insolvent.⁸
- [10] A transaction is an unfair preference, if it results in a creditor receiving from the company, in respect of an unsecured debt, more than the creditor would receive in respect of the debt if the transaction were set aside and the creditor were to prove that a debt in lining up with the company.⁹

² (2003) 21 ACLC 1659.

³ *Dean-Willcocks (as liq of SJP Formwork (NSW) Pty Ltd (in liq)) and Anor v The Commissioner of Taxation (No 2) and Ors* (2004) 49 ACSR 325 at [27].

⁴ See the cases discussed in Thomson Reuters, *Legal Online* (at 25 March 2011) Corporations Legislation, Corporations Act [588FF.20].

⁵ See for example *Electric Light & Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 559-560.

⁶ See the discussion in *Dean-Willcocks* at [28].

⁷ See *Corporations Act 2001* (Cth) s 588FE(2).

⁸ See *Corporations Act 2001* (Cth) s 588FC.

⁹ See *Corporations Act 2001* (Cth) s 588FA.

- [11] Because of concern about the absence of relevant admissions, a facsimile and emails were sent to the solicitors for the parties, inviting the submission of further evidence and material. That resulted in the filing of a further affidavit and further submissions on behalf of the defendants.
- [12] The affidavit of the solicitor for the defendants exhibits a copy of Extremeco's running balance account of taxation liability, said in the affidavit to show the payments received by the defendants. I take that to mean that the defendants admit that the payments referred to in the plaintiffs' statement of claim are now admitted to have been made by Extremeco.
- [13] An insolvency report dated September 2010 was exhibited to the affidavit. The authors of the report (who are the plaintiffs in these proceedings and who are accountants and insolvency practitioners by profession) express the view that Extremeco was insolvent at least from 28 February 2007. They base that opinion on a number of matters, including a negative asset position at about the end of the 2006 financial year, and a marked increase in amounts owed to creditors from January 2007, including an inability to pay a number of debts in the early part of 2007.
- [14] While the affidavit filed on behalf of the defendants does not expressly contain an admission that Extremeco was insolvent by 1 March 2007, it seems by implication to do so; and in any event it exhibits an unsworn report, to which no objection is taken on behalf of the plaintiffs.
- [15] The supplementary submissions for the defendants rely on paragraph 1.1 of the insolvency report, as evidence of the appointment of the plaintiffs as administrators of Extremeco on 31 August 2007. That paragraph records the appointment of the plaintiffs as voluntary administrators of Extremeco by resolution of its director, pursuant to s 436A of the *Corporations Act*. There is an admission of the relation-back day.
- [16] The admitted facts included an admission that a meeting of creditors of Extremeco held on 28 September 2007 resolved that the company be wound up (and that the plaintiffs be appointed as joint and several liquidators). There is no suggestion that the winding up of Extremeco commenced prior to 28 September 2007. Accordingly, the effect of s 513C of the *Corporations Act* in the present case is that the s 513C day for this company is the day on which its administration began. The effect of s 9 and s 435C of the *Corporations Act* in the present case is that its administration commenced on the date of the appointment of an administrator under s 436A. The defendants have relied on paragraph 1.1 of the insolvency report, recording, as mentioned, the appointment of the plaintiffs as administrators of Extremeco under s 436A on 31 August 2007. Accordingly, the s 513C day for Extremeco is 31 August 2007.
- [17] Paragraph 1.1 of the insolvency report also records a resolution of creditors on 28 September 2007 made pursuant to s 439C of the *Corporations Act*. It is admitted on the pleadings that a meeting of creditors on that date resolved that Extremeco be wound up, and that the plaintiffs be appointed as liquidators. With some hesitation, this seems to me sufficient to permit me to infer that the resolution to wind up Extremeco was made by creditors under s 439C, at a meeting convened under s 439A, of the *Corporations Act*. The effect of s 446A(2) then is that Extremeco is taken to have passed, on 28 September 2007, a special resolution under s 491 that the company be wound up voluntarily.

- [18] In those circumstances, s 513B(b) of the *Corporations Act* is applicable. Its effect is that the winding up of Extremeco is taken to have begun on the s 513C day, that is, on 31 August 2007. It follows that transactions which occurred in the period between 28 February 2007 and 31 August 2007 come within the purview of s 588FE. The affidavit makes no admission about the transaction of 2 August 2007, but that does not seem to me to matter.
- [19] Otherwise, the matters which need to be established for the grant of relief are established by the admissions made by the defendants.
- [20] I am therefore satisfied that the transactions referred to in the statement of claim, save for that of 2 August 2007, are voidable because of s 588FF of the *Corporations Act*, and I am prepared to make the orders sought by the defendants, that is,
1. Pursuant to s 588FF of the *Corporations Act* 2001 (Cth), the Defendants pay Extremeco Pty Ltd (in liq) ACN 070 554 406 the amount of \$390,657;
 2. Each party bear their own costs of and incidental to the proceedings.
- [21] In the course of dealing with this application it has been necessary to request further submissions and/or evidence from the applicants on 4 separate occasions. That demonstrates the need for the careful and detailed preparation of an application intended to be dealt with, without an oral hearing. Indeed, it raises a serious question about the utility of such a procedure in a case which requires careful attention to the legal basis and proper proof of necessary facts.