

SUPREME COURT OF QUEENSLAND

CITATION: *Re: NEPV Solar & Anor* [2012] QSC 323

PARTIES: **NICK COMBIS**
(first applicant)
NEPV SOLAR PTY LTD
(second applicant)
v
LIGHTWAY AUSTRALIA PTY LTD
ACN 147 023 890
(respondent)

FILE NO/S: Sup No 8334 of 2012

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 8 October 2012

DELIVERED AT: Brisbane

HEARING DATE: 8 October 2012

JUDGE: Philippides J

ORDER: **Order as per draft.**

CATCHWORDS: CORPORATIONS – WINDING UP – voidable transactions – whether the impugned transactions were insolvent transactions within s 588FC of the *Corporations Act* – whether the company was insolvent at the time the payments were made – whether the impugned transactions occurred within the relation-back period so as to be voidable transactions under s 588FE of the *Corporations Act*

COUNSEL: J Davies for the applicants
No appearance for the respondent

SOLICITORS: Creevey Russell Lawyers for the applicants
No appearance for the respondent

HER HONOUR: This is an application under section 588FF of the *Corporations Act* 2001 (Cth). The applicant, Nick Combis, is a joint and several liquidator of NEPV Solar Pty Ltd, in liquidation, herein after referred to as "the company".

The liquidator seeks from the Court a declaration that certain payments made by the company to Lightway Australia Pty Ltd or to Lightway's debt collection agent are voidable transactions under section 588FE of the Act. Further, the liquidator seeks an order directing Lightway to pay to the company an amount equal to the money that the company paid to Lightway under the transactions. It also seeks costs. Although there was a claim for interest, that is not pursued.

I should indicate that the matter was called and the respondent's name was also called today. There was no appearance by the respondent. There is an affidavit of service which deposes to service of the relevant documentation by express post bag to the registered office of Lightway. I note that the required SEPA notice was also provided. In the circumstances, I am satisfied that there was service as required on Lightway.

The statutory scheme in respect of unfair preferences concerns a number of provisions. Section 588FF of the Act relevantly provides:

"588FF Courts may make orders about voidable transactions

- (1) [**Orders court may make upon voidable transaction**] Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588RE, the court may make one or more of the following orders:
- (a) an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction;
- ..."

A payment by a body corporate is an example of a transaction in section 9 of the Act and voidable transaction is defined in section 588FE which provides, relevantly:

"588FE Voidable transactions

- (1) [**Where company is being wound up**] If a company is being wound up:
- (a) a transaction of the company may be voidable because of any one or more of subsections (2) to (6) if the transaction was entered into on or after 23 June 1993;
- ...
- (2) [**Voidable where company is insolvent**] The transaction is voidable if:

- (a) it is an insolvent transaction of the company; and
- (b) it was entered into, or an act was done for the purpose of giving effect to it:
 - (i) during the 6 months ending on the relation back day; or
 - (ii) after that day but on or before the day when the winding up began."

Insolvent transaction as defined in section 588FC which provides:

"588FC Insolvent transactions

A transaction of a company is an insolvent transaction of the company if, and only if, it is an unfair preference given by the company, or an uncommercial transaction of the company, and:

- (a) any of the following happens at a time when the company is insolvent:
 - (i) the transaction is entered into; or
 - (ii) an act is done, or an omission is made, for the purpose of giving effect to the transaction; ..."

Section 588FA defines unfair preferences relevantly as:

"588FA Unfair preferences

- (1) **[Where transaction unfair preference]** A transaction is an unfair preference given by a

company to a creditor of the company if, and only if:

- (a) the company and the creditor are parties to the transaction (even if someone else is also a party); and
- (b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;

even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency."

Pursuant to section 588E, the liquidator may call in its aid certain presumptions as to the period a company was insolvent. That provision relevantly provides:

"588E Presumptions to be made in recovery proceedings

(1) In this section:

recovery proceeding, in relation to a company, means:

- (a) an application under section 588FF by the company's liquidator;

...

- (3) If:
- (a) the company is being wound up; and
 - (b) it is proved ... that the company was insolvent at a particular time during the 12 months ending on the relation back day; it must be presumed that the company was insolvent throughout the period beginning at that time and ending on that day."

As to the statute definition of "insolvent", section 9 of the Act refers attention to section 95A of the Act which provides:

"95A Solvency and insolvency

- (1) [**When person is solvent**] 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.
- (2) [**When person is insolvent**] A person who is not solvent is insolvent."

As counsel for the applicant in his comprehensive submissions highlighted, in light of the statutory scheme, the liquidator must establish the following matters:

- (a) Each of the transactions in question comprising the alleged preference payments were entered into or given effect to during the six months ending on the relevant "relation-back day";

- (b) the transactions were entered into or given effect to at a time when the company was insolvent or would become insolvent as a result of the transactions;
- (c) Lightway, as creditor, and the company were parties to each of the transactions;
- (d) as a result of the transactions, Lightway received more from the company than it would receive had it proved in the company's winding-up.

In respect of the first matter, as to the dates of the impugned transactions and the relation-back period, it is relevant to note that the company is a company undergoing a creditor's voluntary winding-up. Accordingly, the winding-up is taken to have begun or commenced on the day the company resolved that it be wound up, that is on 30 January 2012. That is also the company's relation-back day for present purposes. Therefore, the impugned transactions must have taken place in the six-month period ending on the relevant relation-back day, being 30 January 2012.

It is apparent from the affidavit of the liquidator that the four transactions in question fall within the relevant relation-back period. They are: 26 October 2011 being a payment of \$66,566.50, 9 December 2011 being \$28,772.13, 23 December 2011 being \$15,000, 3 January 2012 being \$20,000.

In relation to the question of the meaning of insolvency, reference was made to the decision of the High Court in *Sandell v. Porter* [1966] 115 CLR 666 at 670. That decision concerned the meaning of insolvency under the then Bankruptcy Act 1924. Barwick CJ, with whom the other member of the Court agreed, said the following:

“Insolvency is expressed in s 95 as an inability to pay debts as they fall due out of the debtor’s own money. But the debtor’s own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realization by sale or by mortgage of his assets within a relatively short time - relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor’s financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor’s inability, utilizing such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.”

Counsel for the applicant noted that, although the definition in section 95A of the Act has changed slightly since the decision in *Sandell*, the interpretation of the now repealed provision provided by Barwick CJ remains an

authoritative statement of what a Court will consider to be the relevant factors involved in proving that a company was insolvent during the relation-back period.

The issue, in light of the statement in *Sandell*, is a question of fact for the determination of the Court, having regard to the "commercial realities" facing the company at the time it is alleged that it was insolvent. In determining the company's solvency, in the context of the statutory definition that this Court must give regard to and the commercial realities, the company at an identifiable point in time, it is appropriate to consider a number of factors which as a general proposition would be pertinent as to whether a company is able to pay its debts as and when they fall due.

Mandie J in *ASIC v Plymin* [2003] 175 FLR 124 at [386] helpfully outlined some of the indicia pertinent in this context as follows:

- (a) continuing losses;
- (b) liquidity ratios below one;
- (c) overdue Commonwealth and State taxes;
- (d) poor relationship with present bank including inability to borrow further funds;
- (e) no access to alternative finance;
- (f) inability to raise further equity capital;
- (g) suppliers placing the company on COD or otherwise demanding special payments before resuming supply;
- (h) creditors' unpaid outstanding trading terms;

- (i) issuing of post-dated cheques;
- (j) dishonoured cheques;
- (k) special arrangements with selected creditors;
- (l) solicitors letters, summonses, judgments or warrants issued against company;
- (m) payments to creditors of rounded sums which are not reconcilable to specific invoices;
- (n) inability to produce timely and accurate financial information to display the company's trading performance and financial position and make relevant forecasts.

The liquidator deposed to his belief that the company was insolvent "from at least 31 August 2011." In reaching that view, the liquidator outlined in his affidavit the relevant investigations made and considerations taken into account. These included the company's continuing trading losses, its liquidity ratio being below one, an analysis of its balance sheet which indicated an insolvent position since November 2010, overdue Commonwealth and State taxes and employee entitlements, suppliers placing the company on COD terms and special arrangements being made with creditors.

In the circumstances, in addition to being satisfied that the applicant has established that each of the transactions in question were entered into or given effect to during the six month period ending on the relevant relation-back day, I am also satisfied that when

the transactions were entered into or given effect to the company was insolvent.

In relation to the requirements that it be shown that Lightway as creditor and the company were parties to each of the transactions, I note that the company's records indicate that the first payment in question was paid to Lightway, but that the other three payments were made to Dun and Bradstreet. I am satisfied on the material before the Court that those payments were made to Dun and Bradstreet as collecting agent for Lightway and, indeed, the affidavit material shows persuasively from email communications that that was indeed the position.

The final consideration to be established is whether Lightway received more than it would have in a winding-up. The liquidator has addressed that issue at paragraphs 11 to 14 of his affidavit and has concluded that the impugned payments resulted in Lightway receiving more from the company than it would receive if the payments were set aside and Lightway had to prove its debt in the winding-up of the company. I am satisfied on the basis of the matters addressed in those paragraphs by the liquidator that that element is also established.

I note that not only did the respondent not appear today but it failed to file any material in the matter. No defence is therefore enlivened by way of any material filed in the proceedings.

The material before the Court establishes, in my view:

- (a) that the impugned transactions were insolvent transactions within section 588FC, that is to say the company was insolvent at the time the payments were made, and
- (b) the transactions occurred within the relation-back period so that they were voidable transactions under section 588FE.

A draft order has been provided which sets out the orders sought. In addition to a declaration that the payments are voidable transactions, the applicant seeks an order pursuant to section 588FF(1) (a) that the respondent pay to the applicant the sum of \$130,338.63 within 21 days. It is appropriate in my view that that order be made and I make an order in those terms.

I note that costs are sought on a standard basis. The material before the Court indicates that a very comprehensive letter was provided to the respondent setting out in great detail the matters contained in the submissions made before the Court and outlining the reasons why the application would be brought if Lightway refused to make the payments sought. In those circumstances it is appropriate that the applicant's costs of the application are paid by Lightway on a standard basis.

I make the orders sought in the draft, which I will
initial and that will be placed with the Court file.
