SUPREME COURT OF QUEENSLAND No 147 of 1987

CIVIL JURISDICTION

LEE J

IN THE MATTER OF THE COMPANIES CODE (QUEENSLAND)

IN THE MATTER OF ALLAN FITZGERALD PTY LTD (IN LIQUIDATION)

BRISBANE

..DATE 30/03/93

JUDGMENT

HIS HONOUR: There are two applications. The first is by the liquidator seeking an order that certain payments amount to preferences and also for an order that certain payments after the commencement of liquidation be declared void and be paid to the liquidator.

So far as the claim for preferences is based, I find that the respondent APA acted in good faith with respect to both cheques under attack; namely, the two cheques delivered on 28 November 1986.

On the question of ordinary course of business, I find that the first cheque for $80,000 was paid in the ordinary course of business but that the second cheque was not a cheque paid in the ordinary course of business.

On the question of the running account, I conclude that the running account terminates at the commencement of winding up on 13 April 1987.

Insofar as APA's application for validation is concerned, I order that both payments made to APA after the commencement of the winding up be validated.

I will now hear submissions as to costs.

...

HIS HONOUR: These are the orders I make: on the application filed 13 March 1988 by the liquidator there is a declaration that by reason of payments made by the company to APA during the period between 17 November 1986 and 13 April 1987 there was a preference in the sum of $38,837.59 and this sum is void as against the applicant liquidator.

I order that APA forthwith pay the liquidator the sum of $38,837.59 plus interest in the sum of $13,982 totalling $52,819.12 forthwith. The application is otherwise dismissed.

Having regard to all of the issues which were litigated before me, I order that the respondent, APA, pay the liquidator's costs of and incidental to that application to be taxed.

On the application filed by APA on 13 April 1988, I declare that payments by the company to APA of $12,124 on 13 April 1987 and $29,478.13 on 21 May 1987 totalling $41,602.13, be validated.

I order that the liquidator pay APA's costs of and incidental to that application to be taxed.

I publish my reasons.

IN THE SUPREME COURT OF QUEENSLAND — APPLICATION No. 147 of 1987

Brisbane

Before the Hon. Mr. Justice Lee

[Re: Allan Fitzgerald Pty. Ltd. (In Liquidation)]

IN THE MATTER of the COMPANIES (QUEENSLAND) CODE

and

IN THE MATTER of ALLAN FITZGERALD PTY. LTD. (IN LIQUIDATION)

REASONS FOR JUDGMENT - W.C. LEE

Judgment delivered the Thirtieth day of March 1993

CATCHWORDS

Company law - preference - ordinary course of business - business in general and not actual business between company and creditor - good faith - objective test under s. 122(4)(c) of Bankruptcy Act - running account - in calculating preference whether running account terminates on commencement of winding-up or when trading between company and creditor later ceases - validation - good faith - subjective test - whether creditor seeking validation must establish actual improvement in company's financial affairs between commencement of winding-up and winding-up order payments for pre-liquidation debts - whether actual or potential benefit to company and creditors at time of payments to creditor.

Counsel:	R.I.M. Lilley for Applicant/Cross Respondent.
	D.O.J. North for Respondent/Cross Applicant.
Solicitors:	Sly and Wiegall Cannan and Peterson for Applicant/Cross Respondent.
	J.P. Kelly & Co for Respondent/Cross Applicant.
Hearing dates:	30th November 1992,
	1st December 1992,
	2nd December 1992,

3rd December 1992, and
4th December 1992.

IN THE SUPREME COURT OF QUEENSLAND

APPLICATION NO. 147 OF 1987

IN THE MATTER of the Companies (Queensland) Code

and

IN THE MATTER of ALLAN FITZGERALD PTY. LTD.

REASONS FOR JUDGMENT - W.C. LEE J.

Judgment delivered Thirtieth day of March 1993

There are two applications before the court. The first, filed 13th March 1988, is by Graham Lindsay Starkey, liquidator of Allan Fitzgerald Pty. Ltd. (in liquidation) ("the company"). He seeks a declaration that payments made by the company to the respondent, A.P.A. Transport Pty. Ltd., ("A.P.A.") on 15th April 1987 of $12,124.00 and on 21st May 1987 of $29,478.13 (totalling $41,602.13) are void pursuant to s. 368 of the Companies (Queensland) Code ("the Code"), and further that pursuant to s. 451 of the Code, certain payments made by the company to A.P.A. viz. $71,369.93 on 23rd October 1986, $80,000.00 on 28th November 1986, $65,847.35 on 28th November 1986, $74,498.55 on 31st October 1986, and $31,604.08 on 11th March 1987 in the total sum of $323,519.91 (sic $323,319.91) are preferences and void as against the liquidator.

Notwithstanding that the claim as above with respect to preferences was supported by the affidavit of the applicant filed 30th March 1988, it was made clear during the hearing that the claim in this respect was not for $323,519.91, but was in the sum of $108,984.79, being the difference between the sum of $233,834.82 (the figure at which the balance owing by the company on a running account kept between the company and A.P.A. peaked at 30th November 1986), and the sum of $124,850.03 (the balance owing by the company on the account as at the deemed commencement of the

winding-up of the company on 13th April 1987). The only payments attacked by the liquidator were the sum of $80,000 and $65,847.35 on 28th November 1986, but further debits to the running account for work done after that date, reduced the claim for a preference to $108,984.79. At the end of the case, counsel for the applicant sought and was granted leave to add a claim for interest pursuant to the Common Law Practice Act.

The second application was filed by A.P.A. on 13th April 1988 in which it seeks validation pursuant to s. 368(1) of the Code, of the payments by the company to A.P.A. of $12,124.00 on 15th April 1987 and of $29,478.13 on 21st May 1987, totalling $41,602.13. By consent, it was ordered that both applications be heard together and that the evidence in one be taken as evidence in the other.

The company was wound up by order of this court on 23rd June 1987 when the applicant was appointed liquidator. On 16th June 1987, he was appointed provisional liquidator. The application on which the winding-up order was made was filed on 13th April 1987 by Kenneth William Haywood and Donald Charles Haywood trading as “Ken and Don Haywood”, Chartered Accountants, based upon non-compliance with a statutory demand pursuant to s. 364(2) of the Code, for the payment of a debt for accountancy services alleged to be in the sum of $49,000.00. The debt was disputed by the company and it appears that a compromise was reached between the company and those accountants for a significantly lesser sum in the order of $10,000.00 which was apparently paid by the company. However, on 29th May 1987, this court ordered that Kimela Pty. Ltd. be substituted as applicant. On the winding-up order made on 23rd June 1987, the winding-up was deemed to have commenced on 13th April 1987, being the date of filing of the original application (s. 365(2) of the Code).

The applications were closely contested over five days. There were numerous objections to the admissibility of evidence both oral and documentary. The applicant's

application was supported by the affidavit of the applicant filed 30th March 1988, by oral evidence given by the applicant, by Brian Hawkes, Chartered Accountant formerly employed by Ken and Don Haywood, by Desmond William Knight, official liquidator, by Anne Maree Walker, clerk formerly employed by the company, by Gail Colb, former secretary and personal assistant to Mr. Allan Fitzgerald, Managing Director of the company, and by Bradley Vincent Hellen, Chartered Accountant and Manager of the Insolvency Section of the applicant's firm Duesburys. Evidence for A.P.A. was given by George Edward O'Donnell, Managing Director of A.P.A., who also swore an affidavit filed 13th April 1988 (ex. 3). In addition, large volumes of accounting records, schedules and other documents were tendered on behalf of each party. Written submissions were handed up by each party. Counsel for the liquidator also appended a submitted chronology. These submissions were supplemented by lengthy oral submissions. Numerous authorities were cited by each party.

After a considerable body of evidence was led through Mr. Hawkes and a large volume of documents, journals, registers and books of account were tendered, counsel for A.P.A. admitted that the company was insolvent from on or about 17th November 1986. By virtue of s. 451 of the Code and s. 122 of the Bankruptcy Act, the relevant period during which preferences may be attacked as void as against the liquidator commences six months prior to the deemed commencement of the winding-up on 13th April 1987. Viz. 13th October 1986. However, by virtue of the admission of insolvency from 17th November 1986, it was common ground that the period for consideration of preferential payments runs from 17th November 1986 and not from 13th October 1986.

With respect to the applicant's claim based on alleged preferences, the figures are agreed and are set out in ex. 19 tendered on behalf of the applicant and ex. 27 tendered on behalf of A.P.A. These show the daily balances of the running account from 13th October 1986 to 13th April 1987

(ex. 19), and from 13th October 1986 to 17th June 1987 (ex. 27).

Counsel for A.P.A. submitted that should the applicant succeed with respect to the claim based on preferences, the sum involved was not the difference between the peak figure of $233,834.82 on 30th November 1986 and the sum of $124,850.03 owing at the deemed commencement of the winding-up (i.e. 13th April 1987), but rather the difference between the sum of $233,834.82 and the sum of $169,544.93 (being the balance of the outstanding account as at 17th June 1987, being the day after the appointment of the provisional liquidator). This produced the sum of $64,289.89. A.P.A. had continued to supply goods and services to the company after the deemed commencement of the winding-up and right up to the time the provisional liquidator was appointed. It was submitted that the whole period of the running account should be taken into account because it in fact continued past the deemed commencement of the winding-up and right up to the time the provisional liquidator was appointed.

Counsel for A.P.A. further submitted that the figure of $64,289.89 will vary if A.P.A. failed in having validated pursuant to s. 368(1) of the Code, the void payments totalling $41,602.13 made after the deemed commencement of the winding-up. This would mean, he submitted, that the running account balance of $169,544.93 at the date of appointment of the provisional liquidator (16th June 1987) should then be adjusted upwards so as to reverse the subsequent credits to the account of $41,602.13, giving a figure of $211,147.06, which in turn was the figure to be deducted from the peak balance of $233,834.82, giving a net sum of only $22,687.76 which could then be attacked as involving a preference on the adjusted running account. The net effect of this submission was that the maximum which the liquidator could recover if he succeeded under all heads, was the sum of $64,289.89 made up of $22,687.76 as a preference and $41,602.13 pursuant to s. 368(1) of the Code. However, if A.P.A.

succeeded in having validated pursuant s. 368(1) of the Code, the payments totalling $41,602.13, it was submitted that no adjustment to the running account was necessary so that the sum then subject to attack as a preference amounted to the same sum totalling $64,289.89.

Counsel for the applicant opposed this approach as a matter of law, although he did not dispute that as a matter fact, the running account continued past the date of the deemed commencement of the winding-up on 13th April 1987 up to and including the date of appointment of the provisional liquidator on 16th June 1987. Both counsel informed the court that they could locate no authority which decided that when considering a claim for a preference based upon the operation of a running account, the running account cannot extend beyond the date of the deemed commencement of the winding-up. All authorities located dealt only with a running account which extended up to or just before the commencement of winding-up. It follows that if the applicant does not make out a case based on a preference or alternatively if A.P.A. discharges the burden of proof in establishing the matters contained in s. 122(2) of the Bankruptcy Act, it will not be necessary to decide the question of whether or not a running account must be taken to have concluded at the date of commencement of the winding-up.

The Code provisions dealing with preferences are as follows:

> "451(1). A settlement, a conveyance or transfer of property, a charge on property, a payment made, or an obligation incurred, by a company that, if it had been made or incurred by a natural person, would, in the event of his becoming a bankrupt, be void as against the trustee in the bankruptcy, is, in the event of the company being wound-up, void as against the liquidator.
>
> 451(2). For the purposes of sub-section (1), the date that corresponds with the date of presentation of the petition in bankruptcy in the case of a natural person is -

a) in the case of a winding-up by the Court - iii) in any other case - the date of the filing of the application for the winding-up.

451(3). For the purposes of this section, the date that corresponds with the date on which a person becomes a bankrupt is the date on which the winding-up of the company commences or is deemed to have commenced."

The Bankruptcy Act provides as follows:

"122(1). A conveyance or transfer of property, a charge on property, or a payment made, or an obligation incurred by a person who is unable to pay his debts as they become due from his own money (in this section referred to as 'the debtor'), in favour of a creditor, having the effect of giving that creditor a preference, priority or advantage over other creditors, being a conveyance, transfer, charge, payment or obligation executed, made or incurred -

a) within six months before the presentation of a petition on which, or by virtue of the presentation of which, the debtor becomes a bankrupt; ....

is void as against the trustee in the bankruptcy.

122(2). Nothing in this section affects -

a) the rights of a purchaser, payee or encumbrancer in good faith and for valuable consideration and in the ordinary course of business;

122(3). The burden of proving the matters referred to in sub-section (2) lies on the person claiming to have the benefit of that sub-section.

122(4). For the purposes of this section -

c) a creditor shall be deemed not to be a purchaser, payee or encumbrancer in good faith if the conveyance, transfer, charge, payment or obligation was executed, made or incurred under such circumstances as to lead to the inference that the creditor knew, or had reason to suspect -

i) that the debtor was unable to pay his debts as they became due from his own money; and

ii) that the effect of the conveyance, transfer, charge, payment or obligation would be to give him a preference, priority or advantage over other creditors."

The legislation dealing with validation is contained in the Code as follows:

> "368(1) Any disposition of property of the company, other than an exempt disposition, and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding-up by the Court is, unless the Court otherwise orders, void.
>
> 368(2) Notwithstanding sub-section (1), the Court may, where an application for winding-up has been filed but a winding-up order has not been made, by order -
>
> a) validate the making, after the filing of the application, of a disposition of property of the company;
>
> on such terms as it thinks fit.

The company was for some years a very large earthmoving contractor. It built dams, roads, bridges, overpasses, and was involved in airport, electricity and railway developments and other very large projects, particularly for government and semi-governmental authorities both Queensland and Commonwealth. A.P.A. supplied tip trucks to the civil engineering construction industry generally and in particular commenced doing so to the company from 1981/2. On certain jobs, A.P.A. also supplied material such as earth fill. A.P.A. also worked for other very large civil engineering contractors such as Leightons, Clough Engineering, Jennings, Q-Byrt, John Hollands, Thiess Transport, and others.

All of the trucks A.P.A. supplied were owned and operated by subcontractors to A.P.A. A.P.A. paid the truck operators from a schedule of rates previously agreed upon.

A common truck hire rate was $33.50 per hour charged out by A.P.A. to the company although there were other rates for specific jobs. That figure returned the truck operator approximately $30.00 per hour with a balance of about 10 per cent on average or $3.50 per hour being retained by A.P.A. to cover its overhead and profits. After payments of its expenses, A.P.A. showed a net profit of about 1.5 per cent of gross sales. The contractual arrangements therefore existed between A.P.A. and the company and not between A.P.A.'s subcontractors and the company. A.P.A. was separately committed to pay its subcontractors, whether or not it received payment from the company.

In 1985-1986, the company was engaged in extensive work on the Brisbane Domestic Airport for a department of the Commonwealth government. That job substantially drew to a close in the latter part of 1986. A.P.A. supplied trucks to the company for that project. A.P.A. also supplied trucks for the Toombul Overpass project on which the company was engaged. The constructing authority for the latter project was the Queensland Main Roads Department. Other work by A.P.A. for the company included the Fairfield Road project for the Queensland Railways, electrification wbrk for the Queensland Railways at Kallangur, the Underwood Road project at Rochedale for the Logan City Council, and other projects, some of which were more remote from Brisbane. Projects on which A.P.A. were engaged for the company from 13th October 1986 to 17th June 1987 appear from ex. 27. In 1987, A.P.A. supplied trucks to the company for a large project at Callide on which the company was engaged by the Queensland Electricity Commission by contract for a sum in the order of $13.5 million. Mr. O'Donnell was aware of the value to the company of this and other contracts at all material times.

A.P.A. also quoted the company for other large projects over the period 1985-1987, including the Lake Dyer Dam Irrigation Project near Gatton for the Queensland Water Resources Commission. In 1986, A.P.A. also quoted the company for the Burketown Development Road, and a large

project at Gladstone on which the company had been engaged by the Queensland Government Railways, the contract being in the order of $9.5 million, a fact known to Mr. O'Donnell. A. P. A. was not successful in its quotations to the company for these particular projects.

Mr. O'Donnell said in evidence that the company was always engaged in substantial construction projects worth many millions of dollars for government and semi-government instrumentalities and always paid its accounts in due course, in accordance with the practice in the industry whereby subcontractors to the company were paid by the company usually, but not necessarily, after the company had obtained progress payments from the constructing authority. At times, some delays in progress payments were involved which were considered normal in the particular industry. Mr. O'Donnell said that because of the nature of the work in which the company was engaged, he was always certain of being paid.

It clearly emerges from evidence which I accept that it was often the case that a subcontractor to the company, such as A.P.A., would be paid by the company out of progress payments the company received from a particular job which included payment to the company for work done on that project by the sub-contractor.

However, as Mr. O'Donnell pointed out, this was not necessarily the case. I accept that the source of the funds received by the company out of which it made payments to A.P.A., was of no particular concern to A.P.A. I also accept the submission that no trust existed whereby the company was obliged to pay its subcontractors out of sums the company received for work on projects on which a particular subcontractor including A.P.A. worked. Payments by the company to A.P.A. (or to any other sub-contractor to the company for that matter) could be made by the company out of funds it derived from whatever source, and this was clearly a matter of its own business arrangements. Whilst commonly payments were made to A.P.A. by the company out of

funds it derived from projects on which A.P.A. had worked for the company, A.P.A. was merely interested in being paid from whatever source the company derived those funds, whether or not from progress payments from jobs on which A.P.A. had worked, or from bank overdraft or loans or otherwise.

A.P.A. had no particular knowledge of other creditors of the company other than what Mr. O'Donnell may have cursorily gleaned from the White Mercantile Gazette to which A.P.A. subscribed. Plaints and writs were issued from time to time against the company from about 31st May 1986, none of which resulted in any judgment recorded in that Gazette. Mr. O'Donnell investigated many of these and discovered that they were bona fide disputed. He attached no particular significance to them but said that judgments were more significant. In his view, the existence of plaints and writs simply showed that disputes existed between the company and some persons because Mr. Fitzgerald was very a disputive person. The first judgement did not appear in that Gazette until 11th April 1987 for $10,886. The reason for non-payment does not appear. It is clear that Mr. O'Donnell had no knowledge of the fate of the proceedings which were issued or of the judgment.

The evidence indicates that Mr. Fitzgerald probably insisted on precise performance by his sub-contractors and it is not uncommon in an industry such as this when the company was simultaneously engaged in many substantial projects in various parts of the State, probably involving the employment of many sub-contractors, that disputes would arise from time to time. Such disputes were likely to arise in the ordinary course of the company's business and provides no basis for suggesting that the company was unable to pay its debts as they fell due at any particular time, as opposed to being merely unwilling to pay them for whatever reason, even if they were genuine debts, the details of which are not before the court. Even a judgment does not of itself indicate an inability to pay debts as they fall due.

Mr. O'Donnell's awareness of the issue of proceedings against the company or against any of his other customers for that matter, confirms the evidence generally that he was a careful manager of his company's affairs and as with other persons in the industry, attempted to keep his finger on the pulse as far as he was able. A.P.A. was not concerned at any time material to the proceedings with regard to arrangements between the company and any of its other creditors, and did not know of any such arrangements.

The company had a staff of about 100-150. It owned substantial machinery, a fleet of trucks, and three large scrapers which it purchased or leased in early 1986 at a cost of $999,000 each for the Callide project. Mr. O'Donnell said that there were substantial and visible signs of a very successful company, backed by government contracts so that payment of accounts A.P.A. rendered to the company were assured. From the foregoing, it is reasonable to infer that it was generally regarded by the industry that the company was a major and successful contractor of considerable substance. Mr. O'Donnell had this view at all material times and was entitled to hold it. There is no reason not to accept his evidence in this regard which I do.

It is also clear from the evidence which I accept that the supply of trucks by A.P.A. to the company was an essential element in the successful performance by the company of its contractual obligations under its various projects. Whilst I accept that at no time was it ever contemplated by Mr. O'Donnell that, because of the size and standing of the company and because of what he regarded as the long and successful course of dealings between them, A.P.A. would withdraw the supply of trucks to the company, I accept the submission that had A.P.A., a leader in the industry of truck supply to the heavy construction industry, in fact withdrawn its supply of trucks to the company, particularly in 1987, the consequences to the company thereafter would probably have been disastrous. On the evidence, word of such matters travels fast throughout

the industry. It would have been highly unlikely in that event that another supplier of trucks would have stepped into the breach, the result being that the company would have been unable to perform or to continue to perform many of its major contracts. The likely consequence in that event would have been that the company was in breach of contracts (and liable to be wound-up at a much earlier stage), resulting in the earlier withholding of payments to the company by the various principals pending completion of the projects by other and usually more expensive means, and substantial claims for damages against the company. Mr. Starkey's evidence of the situation which in fact rapidly occurred after the appointment of provisional liquidator makes this clear. So also does the endorsement at the foot of ex. 26 and the evidence of Mr. Hellen. Substantial amounts of progress claims were lost and virtually nothing came in after liquidation. See ex. 25.

Also the company was a substantial customer of A.P.A. at all material times. The result in fact of the continued supply of trucks and work done by A.P.A. for the company after 13th April 1987 was that the company was able to continue in the performance of its various contracts. In consequence thereof, it appears from ex. 5 that the company after the deemed commencement of the winding-up, received about $4,846,468.83 in progress payments, all or a substantial part of which probably would otherwise not have been received had A.P.A. not continued to supply trucks. This included considerable sums from the Queensland Electricity Commission on a project at Callide on which A.P.A. did extensive work for the company, particularly from 18th March 1987 right up to 17th June 1987, as ex. 27 demonstrates. A.P.A. also worked on other projects for the company during this period in respect of which the company received progress payments.

Mr. O'Donnell said that in 1986-1987, invoices were produced twice a month and sent out to A.P.A. customers, including the company. Statements were produced after the end of each month and forwarded to the company (as well as

to other debtors of A.P.A.). The account with the company was in fact three separate accounts numbered 30,700, 30,701, 30,702, because the computer program did not allow for an account to record over $100,000. This has made more difficult and at times confusing, an examination of the company's accounts with A.P.A. These were the usual 30 day credit accounts viz if the customer paid the account by the end of the next month after the close of the month of invoicing and rendering of a statement (or, whilst the open item system operated up to July 1986, before the statement was prepared), the account would not be regarded as overdue. Reference is made to the open item system later. I accept Mr. O'Donnell's evidence that payments by the principal to the company and other contractors under the local domestic airport project which came to a close in 1986, were always very prompt and more expeditious than payments by other principals to the company on other and particularly later projects undertaken by the company, some of which were located at considerable distance from Brisbane and involved delays in their administration and certification of progress claims.

Mr. O'Donnell said that he alone dealt with Mr. Allan Fitzgerald, Managing Director of the company on operational matters such as the supply of trucks, as well as on matters relating to payment of A.P.A.'s accounts. Mr. O'Donnell was Managing Director of A.P.A. since 1969 and had the day to day control of A.P.A. He was also Credit Officer responsible for follow-up and collection of A.P.A.'s accounts. He said that payment within 30 days after the end of the month of invoicing was not usual in the industry. Payments were often made up to 45 days from the month of invoice, i.e. up to 15 days overdue after rendering of the monthly statement. Some payments were at times made even later.

Some estimates given were for times taken for payment running from the month of invoicing rather than from the end of 30 days after the end of that month, and required care in considering them. There is nothing sacrosanct about

a 30 day account. If a creditor chooses either by agreement or by a course of conduct to allow a debtor extended credit beyond the 30 day limit, that is his business and does not of itself indicate an inability in the debtor to pay debts as they fall due, or that a payment of such an account, when made, is not capable of being made in the ordinary course of business, or that such a payment is not capable of being received in good faith.

Mr. O'Donnell was cross-examined at length about his diaries from 1986 to 1987 (ex. 29) to which reference will later be made. It is sufficient to now mention that these were not detailed diaries, as Mr. O'Donnell explained, and were usually only shorthand notes of various matters which occurred or which he had to attend to in the future. They were not a full record of any particular matter. Nor were they a contemporaneous record of events as they occurred. Entries were often made ahead as a reminder of something to be done in the future. Nor does it always appear who instigated any particular contact recorded in the diaries. Also, merely because some entries contained a mark which indicated that Mr. O'Donnell had attended to the matter, this did not necessarily indicate that he had initiated the particular matter under consideration.

In 1984-1985, A.P.A. introduced a system whereby at between the tenth to the fifteenth of each month, after the month when payment was due according to the normal 30 day credit, its senior computer operator generated reminder notices to customers whose accounts were not paid in that 45 day period, i.e. when they became overdue by 15 days. An example of such notice is ex. 30. At 15 days overdue, the computer operator also produced a trial balance of aged debtors, and Mr. O'Donnell thereafter telephoned each debtor whose account was unpaid for more than 45 days after the rendering of the statement i.e. more than 15 days overdue for payment.

Mr. O'Donnell said that he phoned Mr. Fitzgerald under this system. Mr. Fitzgerald never said to Mr. O'Donnell

that the company could not afford to pay A. P. A. or any of its other creditors. Often Mr. Fitzgerald would say “Come down next Thursday and pick up a cheque”, which Mr. O'Donnell said was fairly standard practice in his industry. This was usually so for a number of reasons. The customer often preferred to talk in person to Mr. O'Donnell about the service provided and about problems the previous month. This was a useful customer relations exercise. A principal reason was that the company (as well as other customers of A.P.A.) were engaged on projects whereby they received progress payments from time to time and were waiting for such payments out of which accounts would be paid. This was very common in the earthmoving and construction industry.

Progress payments depended upon a number of variables. Certification was required usually by an engineer engaged by the principal. One month could be poor in terms of volume of work. Wet weather was also a problem at times. There were other variables. It follows that delays in certification often occurred, particularly with respect to projects more remote from Brisbane. In such cases, Mr. Fitzgerald said to Mr. O'Donnell that he was expecting a progress payment on some certain date and said “either give me a call before you come down or come down on that day and I will have a cheque for you”. This was also the reason given by Mr. Fitzgerald to Mr. O'Donnell why an account was at times settled by two cheques, one immediately, and one when a progress payment was received by the company. Examples of payments by the company to A.P.A. by two cheques are in March and May 1985, August 1986, September 1986, and again on 28th November 1986 (the payments under attack).

Mr. O'Donnell said that Mr. Fitzgerald was always very reliable with respect to making payments in accordance with any such discussions with him. No cheque of the company was ever dishonoured. Mr. Fitzgerald at times did give Mr. O'Donnell a cheque and ask him not to present it for a few days because he was expecting progress payments. Mr.

Fitzgerald often travelled to the site of projects remote from Brisbane and was at times difficult to readily contact. It is reasonable to infer that at times, he probably handed over a cheque on this understanding prior to his departure from Brisbane.

A.P.A. had solicitors who regularly instituted debt recovery proceedings against slow payers and in some cases, statutory demands were made on debtors pursuant to s. 364(2) (a) of the Companies Code. At no time did A.P.A. make any such demand either through its solicitors or otherwise on the company or institute any proceedings against the company or issue any statutory demand. The only notices which were sent out to the company (along with other debtors) were the polite computer generated reminders of which ex. 30 is an example. As indicated, Mr. O'Donnell was a regular contributor to the White Mercantile Gazette and none of the proceedings which were commenced against the company caused him any concern. It should be noted that Mr. O'Donnell was a certified practising accountant and well versed in matters appertaining to bankruptcy, the winding-up of companies, and the effect of preferential payments to creditors.

Mr. O'Donnell said that at no time until the very end, did he know or suspect or have reason to suspect that the company was insolvent or that it was unable to pay its debts as they fell due from its own moneys. He also said that at no time did he consider that any payments he received had the effect of giving him a preference, priority or advantage over other creditors of the company. As indicated, there is no evidence that Mr. O'Donnell had any particular knowledge of other creditors of the company or of the state of the company's accounts with them, or of any arrangements the company may have had with them. He also said that had he at any time suspected that the company was unable to pay its debts, he would not have continued to supply services on credit as he did.

I was impressed by Mr. O'Donnell's evidence. He appeared to be open and frank and was quick to admit matters which were apparently against his interests. I found him to be truthful and reliable. I generally accept his evidence as to his state of knowledge.

This conclusion is consistent with the concession made on behalf of the applicant that A.P.A. through Mr. O'Donnell was a payee in (actual) good faith within the meaning of s. 122(2). The above conclusion is also consistent with the volume and value of work continued to be performed by A.P.A. for the company right up to the date of appointment of provisional liquidator on 17th June 1987. This is conveniently set out in ex. 27 and is ascertained by adding back the credits for payment received to the figure at the end of each month and deducting therefrom the opening balance. Similar figures from 1st November 1986 - 17th June 1987 may be ascertained from ex. 31. These figures show the following:—

13th October 1986 - 31st October 1986	$36,380.44
1st November 1986 - 30th November 1986	$13,467.64
1st December 1986 - 31st December 1986	$18,136.44
1st January 1987 - 31st January 1987	$12,124.00
1st February 1987 - 28th February 1987	$29,478.33
1st March 1987 - 31st March 1987	$62,365.34
1st April 1987 - 30th April 1987	$42,843.75
1st May 1987 - 31st May 1987	$46,609.26
1st June 1987 - 17th June 1987	$17,705.30

With respect to the period after the deemed commencement of the winding-up on 13th April 1987 and up to the appointment of a provisional liquidator on 16th June 1987, A.P.A. performed work for the company to the value of $86,297.03, whereas during that period A.P.A. received payments only of $12,124 on 15th April 1987 and $29,478.13 on 21st May 1987 (totalling $41,602.13) in respect of part of the debts incurred prior to 13th April 1987. A.P.A.'s total pre-liquidation debt was $124,850.03. Also, of the work to the value of $86,297.03 performed after deemed commencement of the winding-up, work to the value of

$36,273.94 was performed by A.P.A. for the company between the last payment to it of $29,478.13 on 21st May 1987 and up to 16th June 1987 at which time A.P.A. was still owed $169,544.93. A.P.A.'s net debt thus increased after 13th April 1987 by $44,694.90 up to 16th June 1987.

Because a considerable amount of cross-examination occurred as to the state of the company's account with A.P.A. from 1st January 1985 to 30th June 1986, some reference is necessary. A close examination of all of the evidence (documentary and oral) shows that a degree of confusion existed in the attempt to demonstrate the state of the company's account with A.P.A. in this and subsequent periods. It was repeatedly contended that there were no overdue balances in the company's account before July 1986 apart from in three small respects. Mr. O'Donnell appeared at first glance to have agreed with some of these propositions.

However, this is not so notwithstanding the suggestions put to him. This confusion has arisen for various reasons. Firstly, it was not always readily understood that the account was not overdue until the lapse of a further thirty days after the end of the month of invoice and after a monthly statement had issued for the past month. This is a normal 30 day account and is well understood. Reference was at times wrongly made to the account as being up to sixty days overdue when it was in fact less than 30 days overdue. The figures of 40-45 “Days Delay Payment” in the chronology is incorrect. On this basis the submission should have been that the accounts were up to 15 days overdue. There is evidence however, that the account was at times overdue to a greater extent than this in that period.

Secondly, Mr. O'Donnell did not always have in front of him when questioned, the accounts and statements for the period in question. Nor were these documents tendered in evidence. Thirdly, the company had three separate accounts with A.P.A. due to an upper limit in its computer capacity

which made a clear reconciliation of payments in monthly accounts somewhat difficult. Fourthly, A.P.A. had one system in operation up to June 1986 when it changed from an open item system into a carry forward balance system, the difference not being properly understood despite Mr. O'Donnell's explanation of this aspect on several occasions throughout his evidence. Mr. O'Donnell said on more than one occasion that there were in fact overdue balances in the period 1st January 1985 to 30th June 1986 which did not show up on the statements as such because of the previous open balance system whereby payments, even though received after the end of the thirty day period, were credited off the previous monthly statements which were not at that time prepared for the previous month, as if the payments had been made before the end of that month. Fifthly, some of the figures referred to in questions put to Mr. O'Donnell are not always reconcilable from a close examination of the documentary evidence, and particularly ex. 31.

Notwithstanding the foregoing, it is reasonable to conclude that the company, at least up to 30th June 1986, was a reasonably regular payer largely because the company was engaged on the local Brisbane domestic airport project in respect of which the Commonwealth department involved paid its contractors regularly and promptly. Nevertheless, the company's account with A.P.A. was overdue at times during the period January 1985 to June 1986, in addition to the three occasions referred to by counsel for the liquidator which involved relatively small amounts and this was often due to the fact that it was awaiting progress payments from its principals.

Also the company, in the period 1st January 1985 to 30th June 1986 at times paid A.P.A.'s monthly account by two cheques, rather than one, the object being that one could be banked immediately and the second held for a time whilst the company was awaiting a progress payment. This might have indicated a temporary shortage of funds and a temporary liquidity problem, or it might have indicated that the company was simply adhering to its practice with

which Mr. O'Donnell agreed of making payments out of progress payments received, i.e. that is out of liquid funds rather than out of funds which might otherwise have been raised by bank overdraft or a charge on assets or otherwise. Examples occurred in the months of March and May 1985. Also since 1st July 1986, the company paid A.P.A.'s account with more than one cheque on several occasions for the same reasons, which were well known to Mr. O'Donnell and accepted by him as normal in the particular industry in which he was engaged, viz. August 1986, September 1986, and 28th November 1986.

This practice in my view in no way supports any inference that had the second cheque been banked at the time it was handed over (contrary to the friendly arrangements between Mr. O'Donnell and Mr. Fitzgerald), it would not have been met by the bank. There is no evidence to show what the company's bank would have done with any such cheque if banked. There is no proof that if banked, it would not have been met. No one from the bank gave evidence. Nor does this arrangement of payment of a monthly account by two cheques instead of one, indicate that the company was not otherwise able to pay its debts as they fell due. There is nothing unusual about the company trading in overdraft, as many businesses do.

It is also necessary to refer to the company's account with A.P.A. for the period from 1st July 1986. It was put to Mr. O'Donnell that there was an overdue balance of $82,904 shown in the July 1986 statement and that it related to the May work which should have been paid by 30th June 1986. It was put to him that July 1986 was the first month in which A.P.A. did not receive a cheque from the company, and that there would have been computer print outs sent out to the company from July onwards. Mr. O'Donnell said “If it is in July statement, yes.” This suggestion is clearly incorrect. It emerges from ex. 31 that the value of work invoiced for the month of May 1986 was only $54,593.85. After the change in A.P.A.'s accounting system from about 1st July 1986, whereby outstanding balances were

carried forward, no such sum appears as outstanding at 30th June 1986 for May 1986, by which time it should have been paid. Mr. O'Donnell said in evidence, which I accept, that this sum was paid to A.P.A. on 3rd July 1986 (three days overdue) and that, under the previous open balance system then in operation, that payment was treated as if it had been paid by 30th June 1986, merely because the June statement had not then been prepared. Those statements were in the ordinary course prepared during July and payments (even if overdue) made in the early part of July were merely offset against May invoices, which were then, on the statement, not shown as overdue. Exhibit 31 confirms this. It should be said that merely because the company may have drawn a cheque as at the end of a particular month, this does not mean that the cheque was received by A.P.A. on that date.

It is therefore incorrect to suggest that no payments were made in July 1986. A payment was made on 3rd July 1986 as Mr. O'Donnell said in evidence. This accounts for the fact that during July, there was no reminder notice and no phone calls to the company for overdue amounts simply because the May account had been paid in fact, although three days late (i.e. 33 days after the end of the month of May). Thereafter, the value of work done monthly from June 1986 up to June 1987, the date of cheques by the company as per the company's cash payments journal (ex. 6), periods overdue, and date of banking by A.P.A. appear from the following table. Apart from the two consecutive cheques dated 28th November 1986 which were apparently handed over at the one time on that date, the evidence does not clearly establish whether the two cheques in August 1986 and September 1986 were handed over at the one time or delivered separately, or the precise dates when they were handed over, or the dates of the second cheques, notwithstanding that the August payments were by consecutive cheques and the September payments were not. The cheques were not tendered in evidence, but nothing would appear to turn on this. The dates of banking by A.P.A. of the cheques from 3rd July 1986 to 24th October

1986 may not be exact but are inferred from the date of clearance in the company's bank statements (ex. 9).

MONTH WORK DONE	VALUE OF WORK DONE	DATE OF CHEQUE (NOT NECESSARILY DATE RECEIVED) (AS PER CASH PAYMENTS JOURNAL)	OVERDUE BASED ON 30 DAY CREDIT)	DATE OF BANKING BY A.P.A. OR CLEARANCE ON COMPANY'S BANK ACCOUNT	AMOUNT
MAY 86	54,593.85	(UNCLEAR)	3 days	3.07.86	
JUNE 86	110,078.75	21.8.86	21 DAYS	21.08/86	50,000.00
		25.08.86	25 DAYS	26.08.86	60,078.75
JULY 86	74,910.47	22.09.86	22 DAYS	23.09.86	50,000.00
		23.09.86	23 DAYS	26.09.86	24,910.47
AUG. 86	71,569.93	23.10.86	23 DAYS	24.10.86	71,569.93
SEPT. 86	145,868.63	28.11.86	28 DAYS (CONCEDED)	1.12.86	80,000.00
	(145,847.35)	”	28 DAYS (42 DAYS WHEN BANKED)	12.12.86	65,847.
OCT. 86	74,498.55	31.12.86	31 DAYS	5.01.87	74,498.55
Nov. 86	13,467.64)		70 DAYS		
	)				
DEC. 86	18,136.44)	11.03.87	39 DAYS	11.03.87	31,604.08
JAN. 87	12,124.00	15.04.87	46 DAYS	15.04.87	12,124.00
FEB. 87	29,478.13	21.05.87	51 DAYS	21.05.87	29,478.13
MAR. 87	62,365.34	UNPAID			
APR. 87	42,843.75	"			
MAY	46,609.26	"			

87
TO 1717,705.30 "
JUNE
87

This table makes it clear the extent to which the company's account with A.P.A. was overdue at the date of each payment according to normal 30 day credit which was extended by A.P.A.. It also shows that the “Days Delay in Payment” in the chronology are misleading, because in general, a further month was added to the true number of days overdue. However, over the period leading up to the handing over of the two impugned cheques apparently late on Friday, 28th November 1986, and their subsequent banking, the delay in payments probably extended slightly from the average periods overdue to 30th June 1986 (which is not entirely clear in the evidence), to a maximum of 28 days overdue with respect to the cheque on 28th November 1986 of $80,000 (banked first available banking day Monday, 1st December 1986) and 42 days with respect to the cheque for $65,847.35 by the time it was banked. Payments during August 1986 for the June account (two cheques), during September for the July account (two cheques), and in October were a little over 20 days overdue so that the pattern which occurred up to 28th November 1986 was fairly consistent apart from the delay of 42 days before which the cheque for $65,847.35 handed over on 28th November 1986 was actually banked.

What occurred subsequently is not directly relevant to the question of whether there were preferences constituted by the payments of $80,000 and $65,847.35 except to the extent that the state of the running account thereafter may indicate the state of mind of Mr. O'Donnell at the time of the impugned payments. Indeed, as Barwick C.J. and Kitto J. said in Queensland Bacon Pty. Ltd. v. Rees (1965-6) 115 C.L.R. 266 at 300, 306 respectively, the later conduct is of considerable confirmatory value and cannot be ignored.

I now turn to the particular claims.

THE PREFERENCE CLAIM

By virtue of s. 122 of the Bankruptcy Act, the applicant must prove various matters all of which, for relevant purposes, are cumulative. These are:

a) Payments were made during the six months' period prior to the filing of the application to wind up;

b) By a company unable to pay its debts as they become due from its own money;

c) In favour of a creditor; and

d) Having the effect of giving the creditor a preference, priority or advantage over other creditors.

It was agreed that the period ran from 17th November 1986, the date from which it was admitted that the company was unable to pay its debts as they become due from its own moneys. It was also agreed that subject to the question of when the running account ends for the purposes of the preference claim, the relevant payments were made within the six months' period by the company to A.P.A. as appears from exs. 19, 27, the affidavit of Mr. O'Donnell (para. 8), by the cash payments journal of the company, (ex. 6), and the company's bank statements (ex. 9). All payments during that period, including the only payments attacked by counsel for the liquidator of $80,000 and $65,847.35, are as follows:

MONTH WORK DONE	VALUE OF WORK DONE	DATE OF CHQ BY COMPANY	DATE OF BANKING BY RESPONDENT	AMOUNT
Sept. 86	$145,847.00	28th Nov. 1986	1st Dec. 1986	$80,000.00
		28th Nov. 1986	12th Dec. 1986	$ 65,847.35
Oct. 86	$74,498.55	31st Dec. 1986	5th Jan. 1987	$74,498.55
Nov. 86	$13,467.64)			

	)				
Dec. 86	$18,136.44)	11th 87	Mar.	11th Mar. 87	$31,604.08
				TOTAL	$251,949.98

It was agreed that providing there was a preference, this figure is to be reduced to arrive at the difference between the peak indebtedness of $233,834.82 on 30th November 1986 (i.e. the balance of the account immediately before the payment of $80,000 banked on 1st December 1986 see exs. 19, 27), and either the sum owing at the commencement of the winding-up on 13th April 1987, $124,850.03, or the sum owing at the end of the running account in fact on 16th June 1987, $169,044.93 as above pointed out, according to the decision of the court as to the appropriate date.

The reason why only the payments of $80,000 and $65,847.35 were attacked was that at no time after such payments were made was there any peak indebtedness which exceeded the balance of $124,850.03 owing to A.P.A. on 13th April 1987 or the balance of $169,044.93 owing as of 16th June 1987. It was agreed that there could be no preference, apart from the effect of one or both of those two payments, and that if only the second payment of $65,847.35 was a preference, then the peak indebtedness just before that payment was only $163,687.62 (ex. 19, 27), so that the claim for a preference would in that event be only $38,837.59 (i.e. $163,687.62 - $124,850.03) if the sum owing as at the deemed commencement of the winding-up was the relevant sum, or nil if the sum owing as at the appointment of the provisional liquidator on 16th June 1987 was the relevant sum (i.e. $169,044.93).

Whilst it was not expressly conceded by counsel for A.P.A., it was not seriously disputed that the above two payments had the effect of giving the respondent a preference, priority or advantage over other creditors. It was conceded that this did not mean over all other creditors. The evidence now adduced by the applicant and of which Mr. O'Donnell at all material times had no knowledge,

has established this requirement by a sample of other creditors so affected, and by evidence that other creditors fell into this category. See the statement of affairs exhibited to Mr. Starkey's affidavit, principally schedules “F” and “H”, and exs. 20, 21, 23 and 24. The test is whether, by the payments referred to, the rights of A.P.A. vis-a-vis the other creditors has changed so that the share of the other creditors will be less. The above payments now show that A.P.A. was paid in full for work done during the months referred to whereas other creditors had not been paid at all or to the same extent and indeed, the unsecured creditors would probably receive less than 100 cents in the dollar. See Mr. Starkey's affidavit para. 8 (iii), and the oral evidence of Gail Colb and Mr. Hellen. This requirement is clearly established.

The applicant having proven the matters required by s. 122(1) of the Bankruptcy Act, A.P.A., by virtue of s. 122(3) of that Act, has the burden of proving the matters contained in s. 122(2). By that sub-section, A.P.A. must establish that it was a payee in good faith, and for valuable consideration, and in the ordinary course of business. Each of these requirements is cumulative.

Counsel for the applicant made it clear at the outset that the only matter in issue which the respondent had to prove pursuant to s. 122(2) was that the payments were made in the ordinary course of business. He conceded that all payments were made for valuable consideration, and this is clearly so with respect not only to the above four payments, but also with respect to the two payments made by the company to A.P.A. after the commencement of the winding-up and which are the subject of A.P.A.'s claim for validation.

Also he did not claim that there was no good faith and conceded that A.P.A. did not have to establish actual good faith. He relied however, on the deeming provisions of s. 122(4)(c) of the Bankruptcy Act and submitted that the events surrounding the two payments of $80,000 and

$65,847.35 in November/December 1986 triggered those provisions by which a payee is deemed not to be a payee in good faith. It was submitted that the payments in November/December 1986 were made under such circumstances as to lead to the inference that A.P.A. knew, or had reason to suspect that the company was unable to pay its debts as they became due from its own money and that the effect of the payments was to give it a preference, priority or advantage over other creditors. The result it was submitted, is that the Court was precluded from finding that A.P.A. was a payee in good faith: Re Weiss [1970] A.L.R. 654 at 665 per Gibbs J., citing Queensland Bacon Pty. Ltd. v. Rees (1965-6) C.L.R. 266 per Barwick C.J. at 287.

It was agreed that where the applicant relied on the deeming provisions, the applicant had the onus of establishing the various matters contained in the sub-section from which the necessary inferences were capable of being drawn. All of these matters are also cumulative. No onus was cast on A.P.A.: Queensland Bacon Pty. Ltd. v. Rees (supra) at 287; Re Weiss (supra) at 665; Re Cooke; ex parte Official Trustee and Bankruptcy v. Miller Bros. Melbourne Tankworks Pty. Ltd. (1985) 4 F.C.R. 398 at 411; Castellucci; ex parte Pipkin (1983) 68 F.L.R. 162 at 166.

However, counsel for A.P.A. submitted that the evidence led by A.P.A., when considered in the light of all of the evidence in the case, clearly negatived the matters contained in s. 122(4)(c) so that no such inferences could be drawn as would displace the conceded actual good faith by A.P.A. with respect to all four payments referred to above. He further submitted that A.P.A. had discharged the onus on it under s. 122(2),(3), in establishing that the payments were made in the ordinary course of business.

Therefore for the applicant to succeed with respect to a claim based upon preferences (subject to a, determination of the quantum thereof), it must be shown either that A.P.A. has not discharged the onus upon it of establishing

on the balance of probabilities that the payments in November/December 1986 were made in the ordinary course of business, or alternatively (or in addition thereto), and notwithstanding that actual good faith has been conceded, that the applicant has discharged the onus in establishing the facts and circumstances referred to in s. 122(4)(c), from which the inferences referred to therein may be drawn so that A.P.A. in that event is deemed not to be a payee in good faith.

In these circumstances, there can be some overlapping of the two concepts: see K. & R. Fabrications (Qld) Pty. Ltd. v. M. & B. Rigging Pty. Ltd. [1982] Qd.R. 585 at 587. However, a payment can be made in good faith, whilst at the same time being a payment not made in the ordinary course of business: Taylor & Anor. v. White & Anor. (1964) 110 C.L.R. 129 per Taylor J. at 153; Re Cummins (t/a NAM Constructions) ex parte Harris & Anor v. ARC Engineering Pty. Ltd. (1985) 62 A.L.R. 129 (Pincus J. as His Honour then was). The liquidator in this case has to a large extent relied upon similar circumstances to support both the submission that these payments were not made in the ordinary course of business as well as the submission that the circumstances surrounding these payments indicated that the inferences should be drawn under s. 122(4)(c) of the Bankruptcy Act which deems A.P.A. not to be a payee in good faith. It is convenient first to deal with the submissions in relation to s. 122(4)(c) of the Bankruptcy Act.

SECTION 122(4)(c) OF THE BANKRUPTCY ACT

The case for the liquidator, as emerged from the course of proceedings and submissions, to justify the drawing of the necessary inferences as at the date of the handing over of the two cheques on Friday, 28th November 1986, and leading up to the banking of the second cheque on 12th December 1986 is as follows:

1. The relatively current state of the company's account with A.P.A. from January 1985 to June 1986

and the absence of reminder notices or phone calls in that period.

2. The progressively longer periods in which payments were made between July 1986 and 28th November 1986 (and 12th December 1986) with various telephone calls to Mr. Fitzgerald in connection with some payments, as well as the ordinary reminder notices.

3. The issue of several court proceedings against the company on 31st May 1986, 21st June 1986, 12th July 1986, 20th September 1986, 11th October 1986.

4. The fact that some payments were made by two cheques (i.e. August, September and finally 28th November 1986.

5. The fact that the two payments by cheques handed over on 28th November 1986 were from progress payments received by the company from projects on which A.P.A. had not worked at the relevant time and that there was no evidence to show that Mr. O'connell knew the company's profit component out of those progress payments out of which payments could legitimately have been made to A.P.A.

6. The company when it handed over the cheque for $65,847.35 on 28th November 1986 did not know when it could be banked and when there would be funds to meet it, with no evidence of temporary liquidity problems which would have given an innocent explanation to the circumstances surrounding the handing over and the banking of the two cheques.

7. Most importantly, by the circumstances surrounding the handing over of the two cheques in question on 28th November 1986 and leading up to the deposit of the second cheque on Friday, 12th December 1986, as allegedly contained by reference to Mr. O'Donnell's diaries and his oral evidence.

The case for A.P.A. as emerged from the course of the proceedings and submissions, is as follows:

1. The onus was on the liquidator to clearly prove the facts from which the necessary inferences would objectively be drawn by a reasonable businessman in the position of Mr. O'Donnell and with his knowledge of the background and circumstances prevailing. It was submitted that this onus had not been discharged. If a doubt existed, it must be resolved in favour of A.P.A.

2. The period 1985-1986, whilst remotely relevant to the question of good faith, was not capable of supporting any of the necessary inferences. See Queensland Bacon Pty. Ltd. v. Rees (supra).

3. As there was no actual insolvency until 17th November 1986, there could be no inference that A.P.A. knew or had reason to suspect that the company was unable to pay its debts as they became due from its own money prior to that time: Queensland Bacon Pty. Ltd. v. Rees (supra) per Barwick C.J. at 292.

4. It was customary for A.P.A. to bring up the question of payment after an account was more than 15 days overdue by a friendly computer reminder notice to the debtor followed by a telephone call. It was common commercial experience that even the best of customers are reluctant to part with money and that the only efficient way of running a business is to have a system which continually brings to the customer's attention, the fact that the seller would like to be paid: Re Tellsa Furniture Pty. Ltd. (1985) 9 A.C.L.R. 869 per Young J. at 876-7.

5. There was nothing unusual about payments of a monthly account being made at times by two cheques, having regard to Mr. O'Donnell's evidence that the cheque held was always to await receipt by the

company of a progress payment. This had occurred in March and May 1985, August 1986, September 1986, and again on 28th November 1986: See Re Tellsa Furniture Pty. Ltd. (supra) per Young J. at 876 where His Honour referred to this as being “more of a friendly commercial arrangement than the way the liquidator seemed to view it, namely, that of a creditor continually pressing it for payment”.

6. Mr. O'Donnell's knowledge of plaints or writs issued against the company were irrelevant and at best showed that Mr. O'Donnell was a competent businessman keeping his finger on the pulse. Also, his investigations showed that many of these items were genuinely disputed debts and in no way indicated that the company was insolvent rather than being unwilling to pay those debts (for whatever reason).

7. Even though the method by which the company paid A.P.A.'s accounts was a result of a friendly and on-going business relationship between them, with no evidence that Mr. O'Donnell knew or had reason to suspect that the company was unable to pay its debts as they fell due, there was evidence, if evidence be needed, of a temporary liquidity problem endured by the company. Mr. O'Donnell's evidence was unchallenged (250, 254, 255). At 254 l. 40 Mr. O'Donnell said:

> “Did anything concern you about that arrangement?-- No. I remember Mr. Fitzgerald telling me that it was on a particular contract and I think was Callide that he was waiting for a cheque on because I remember him sayxng he was waiting for a cheque for our account....
>
> See also p. 255
>
> “Do you recall being told that Mr. Fitzgerald was expecting further funds?-- Yes I do recall that.
>
> See also p. 301 in cross-examination.

"Yes, he asked me to hold it until he received a progress payment."

8. There was no evidence that Mr. O'Donnell at any time acted from fear or apprehension.

9. The undisputed evidence was that the company from all outward appearances was a substantial and successful company with major contracts funded by Commonwealth and State Governments and statutory authorities.

10. No demands had ever been made by A.P.A. on the company and no cheques had ever been dishonoured. Mr. Fitzgerald always paid his debts as promised.

11. There was no evidence of arrangements that the company may have had with other creditors.

12. The undisputed evidence was that Mr. O'Donnell at no time either knew or suspected or had reason to suspect that the company was actually insolvent or that it was unable to pay its debts as they fell due from its own money. Nor did he at any time consider that any payments he received had the effect of giving him a preference, priority or advantage over other creditors.

13. A.P.A.'s conduct in continuing to supply substantial credit to the company right up to June 1987, whilst not being the test required by the sub-section, nevertheless had considerable confirmatory value which could not be ignored: Queensland Bacon Pty. Ltd. v. Rees (supra) per Barwick C.J. at 300, per Kitto J. at 306. Mr. O'Donnell said that had he suspected insolvency, he would not have continued to supply credit and would have withdrawn the supply of trucks to the company.

14. No objective businessman, possessed of the knowledge possessed by Mr. O'Donnell at all material times,

could properly draw either of the inferences referred to in s. 122(4)(c), either from the background circumstances relied upon by counsel for the liquidator, or from the facts and circumstances surrounding the delivery of the two cheques on 28th November 1986 and the ultimate banking of the second cheque on 12th December 1986.

As the diary entries (ex. 9) and oral evidence in relation to them loomed large in the case on the question of good faith as well as on the question of the ordinary course of business, some reference must be made to that material. The relevant entries and evidence surrounding them appear as follows:

1. Monday, 24th November 1986 - “Jobs: (1) Fitzgerald re money” with a mark indicating that Mr. O'Donnell had attended to this matter. Whilst he could not specifically recall the telephone call, he said that this was not a promise that A.P.A. would receive a cheque on Friday, 28th November 1986. At 24th November 1986, the September account of $145,847.35 was 24 days overdue and this telephone call accords with Mr. O'Donnell's usual practice of telephoning customers whose accounts were more than 15 days overdue, the usual computer generated reminder also having gone out in the ordinary course. Mr. O'Donnell said that it could have meant “call on Friday about a cheque” and that it was standard practice to ring Mr. Fitzgerald before a visit because he may not have been there at the time. I accept Mr. O'Donnell's evidence as to the effect of this entry.

2. Friday, 28th November 1986 - “Fitzgerald re money” and “C.M.P.S. money for Ted $80,000”. Mr. O'Donnell said that this entry could have been put there on Monday, 24th November 1986 in accordance with his practice to make entries ahead as reminders of matters to be attended to in the future. Mr.

O'Donnell said he probably rang Mr. Fitzgerald regarding a payment, and that the reference to C.M.P.S. was probably an indication from Mr. Fitzgerald that he was getting a cheque from C.M.P.S. and that he allocated $80,000 out of it to A.P.A. He said that C.M.P.S. was not a job on which A.P.A. had worked at that time. Mr. O'Donnell was handed two cheque, one for $80,000 and one $65,847.35, and with respect to the second cheque said that Mr. Fitzgerald “asked me to hold it until he received a progress payment”. He added “I'm almost certain he said the progress payment from Callide and, again, we weren't working at Callide at the time.” In re-examination he said that it was “very possible” that on or about this date (28th November 1986) he made an entry ahead on Wednesday, 10th December 1986 which is referred to below. This was his practice. Of significance was his evidence that Mr. Fitzgerald at times gave him a cheque and asked him not to present it for a few days because “he was expecting payments from a particular contractor”. When Mr. O'Donnell presented the cheques they always cleared. And further, after referring to the fact that one cheque for $80,000 given on that date was presented and paid, he said that he received the cheque for $65,847.35 with the request that he hold it. He was not concerned about this arrangement as submitted by his counsel - see above.

3. Thursday, 4th December 1986 - “Alan hold for Wednesday” - Mr. O'Donnell agreed that this was a reference to the cheque ($65,847.35), but there is no evidence as to whether this was a reference to a telephone call and if so who initiated it. Nor does it appear when this entry was inserted on that page bearing that date. Mr. O'Donnell said that a call was received from John Goes, an operations man in the employment of the company about prices for a job. Mr. O'Donnell probably had advice that day,

regardless of who initiated the contact, to hold the cheque until Wednesday, 10th December 1986, having regard to the fact that on 28th November 1986, Mr. O'Donnell was asked to hold the cheque for an unspecified period or perhaps for a “few days” in accordance with Mr. Fitzgerald's practice.

4. Wednesday, 10th December 1986 - “Hold cheque until Wed. Fitzgerald”. Mr. O'Donnell did not remember any conversation that day or its connotation. I accept his evidence that the hand-writing was a reference to “until Wed” and not to “until told” as put to him by counsel for the liquidator. This independently appears by a close examination of the hand-writing with other writing in the diaries made by Mr O'Donnell. In cross-examination, Mr. O'Donnell agreed with the suggestion put to him that he rang to see if it was all right to bank the second cheque. He said “Yes, which is the tenth of the month”. He also said “Yes” to the proposition that he was told “No, you can't. You have got to hold it another seven days”. This evidence is not entirely clear, having regard to Mr. O'Donnell's statement that he could not remember the conversation or its connotation in respect of which the diary entry does not help. Also in re-examination, he said that it was “very possible” the entry on 10th December 1986 was made by him on or about 28th November 1986 as a consequence of what was said to him on 28th November 1986 when he received the cheque. He said that if this was so, it would explain why on the Thursday (11th December 1986) there was a job to do which says “(8) Fitzgerald re cheque”. It seems more likely that if this entry was made ahead in accordance with Mr. O'Donnell's practice, it was entered on 4th December 1986 when receiving an indication “Alan hold for Wednesday” and would more appropriately fit in with his telephone call on Thursday, 11th December 1986.

If this is correct, then Mr. O'Donnell was probably not told on Wednesday, 10th December 1986 to hold the cheque for a further seven days although he probably had a telephone call about it on that date. Counsel for the liquidator conceded that the diary entry on 10th December 1986 was in dispute.

5. Thursday, 11th December 1986 - “(8) Fitzgerald re cheque” with a mark beside it which Mr. O'Donnell said was a job for him to do. He said that it “would indicate that I have spoken to someone on that”. In cross-examination he said “Yes I rang Alan”. He did not agree with the proposition that he rang Mr. Fitzgerald on 11th December 1986 notwithstanding that on the previous day he was told to hold the cheque until the following Wednesday, 17th December 1986. He said that he did not remember any conversation with anyone there or what had happened at all, and that he was not aware of the connotations from the entry on 10th December 1986.

On the evidence it is more likely that on 10th December 1986, even though there was probably a telephone contact, Mr. O'Donnell was not told to hold the cheque another seven days i.e. to Wednesday, 17th December 1986 and that the entry on 10th December 1986 was probably put ahead there on 4th December 1986 in accordance with Mr. O'Donnell's usual practice. This is somewhat confirmed by the fact that there was no entry ahead in the diary on Wednesday, 17th December 1986 in accordance with his usual practice (which I accept) to remind him of something to check up on that date, given that his company was at that time owed a substantial sum of money. It also fits in with the telephone call on Thursday, 11th December 1986 which would have been pointless had he in fact been told on Wednesday, 10th December 1986 to hold the cheque for another seven days i.e. to Wednesday, 17th December 1986.

6. Friday, 12th December 1986 - Cheque banked. No entry in the diary but Mr. O'Donnell said in evidence-in-chief that “obvious I have been rung on the 12th and told that it was okay to present the cheque at that time”.

7. Wednesday, 17th December 1986 - No relevant entry in the diary.

It appears that there were probably three telephone calls regarding the second cheque after it was handed over on 28th November 1986 i.e. on 4th December 1986, 10th December 1986, and again on 11th December 1986 on which date Mr. O'Donnell said he rang Mr. Fitzgerald. It also appears that there was a telephone call on Friday, 12th December 1986.

It was further submitted that by receiving the cheque for $65,847.35 with instructions not to bank it and with no specified date given on which to bank it, it was the same as an instruction “Don't bank this” or “I don't have the money” or “Not only do I not have the money, but I don't know when I going to get it”. It was further said that there was no need for Mr. O'Donnell to ring the company on Wednesday, 10th December 1986 (which entry counsel conceded was the subject of a dispute). He submitted that the effect of what occurred was that the cheque for $65,847.35 was the same as a bounced cheque which meant that the transaction was not in the undistinguished common flow of business. It was also submitted that there was no difference between this arrangement and an arrangement for a post-dated cheque, because a post-dated cheque was handed over with a representation that in some days there would be money to meet it and that the handing over in these circumstances was the same as handing over of a post-dated cheque, dishonoured on first presentation, and met when presented the second time.

From the foregoing, it was submitted that not only was the handing over of one or both of the two cheques on 28th November 1986 and the circumstances leading up to the

banking of the second cheque on 12th December 1986, transactions which were not entered into in the ordinary course of business, but also that an objective by-stander possessed of the background and information which Mr. O'Donnell possessed at the material times, would necessarily infer that A.P.A. knew or had reason to suspect that the company was unable to pay its debts as they became due from its own money and that the effect of one or both of those payments would be to give A.P.A. a preference, priority or advantage over other creditors.

It was conceded that there is no onus on A.P.A. to negative the existence of circumstances from which the described inferences could be drawn by the court. That onus is on the liquidator, and if there is a doubt as to whether the inferences should be drawn, the preference should not be voided Barwick C.J. in Queensland Bacon Pty. Ltd. v. Rees (supra) at 287 made this clear. He said:

> "The condition it raises is that the court is positively satisfied that the circumstances of the payment justify the inference by it that the creditor knew or had reason to suspect the insolvency and the preference. To treat this as imposing an onus on the creditor to negative the existence of any such circumstances is, in my respectful opinion, to misread the subsection.
>
> If the court, otherwise satisfied of good faith, has no material or insufficient material from which it can draw the inference mentioned in s. 95(4), the creditors' exculpation under s. 95(2), if otherwise made out, will be complete; or if, in such circumstances, the court is in doubt as to whether or not the inference should be drawn, the preference should not be avoided."

In Australia, the test to be applied under this sub-section is an objective one. See per Latham C.J. in Downs Distributing Co. Pty. Ltd. v. Associated Bluestar Stores Pty. Ltd. (In Liguidation) (1948) 76 C.L.R. 463 at 475-6. Also, the sub-section requires that it is the fact of actual insolvency which must be known or suspected. Barwick C.J. in Queensland Bacon Pty. Ltd. v. Rees (supra) at 291-2 said:

“In the first place, to satisfy s. 95(4) the circumstances of the voided payment must be such as to lead to the inference that the creditor knew or had reason to suspect the fact of the debtor's insolvency. It is not enough that the circumstances are such as to lead to the inference that the creditor had reason to suspect that the debtor might be insolvent. The words of the sub-section, to my mind, are quite clear that it is the fact of actual insolvency which must be known or suspected. To be insolvent, the debtor must be unable, as distinct from merely unwilling, to pay his debts as they fall due. It is one thing to suspect the man's solvency in the sense that one doubts whether he is solvent or insolvent. It is another thing to suspect that he is in fact insolvent. It is of the latter suspicion that s. 95(4), in my opinion, speaks.”

Kitto J. in the same case at 303 said:

“A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to ‘a slight opinion, but without sufficient evidence’ as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which ‘reason to suspect’ expresses in sub-s. (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of a payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes - a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditor.

The question thus posed by the sub-section is to be answered in the present cases as at the time when each of the relevant payments was about to be accepted. It is an objective question. What the payee or anyone else inferred at the time is not to be treated as decisive, though the Court may be assisted in reaching its own conclusion by seeing how business men in fact reacted to the circumstances.”

These principles are succinctly encapsulated in the judgment of White A.C.J, in Freer v. Dot'n Line (Australia) Pty. Ltd. (1992) 10 A.C.L.C. 1304 at 1309:

> "The High Court authorities insist that the court itself draws those inferences which a reasonable and impartial businessman would draw from the circumstances. The issue is not determined by considering what the creditor himself believes or suspects. There is good reason for this. The creditor has a strong self-interest in disclaiming any suspicion in order that he might more easily make out a defence and retain the preferential payment."

In Queensland Bacon Pty. Ltd. v. Rees (supra), Barwick C.J. at 300 said:

> "That business men do not infer insolvency or find ground to suspect its existence does not of course mean that the court cannot find that the circumstances were such that the creditors had reason to know or to suspect that insolvency. But their optimism, backed up as it was in this case, by their action in continuing to give credit to the company cannot, in my opinion, be ignored when deciding whether the recipient of a preferential payment ought to have known or suspected the insolvency of his debtor."

See also per Kitto J. (ibid.) at 306. Also Barwick C.J. at 292 said:

> "It is the circumstances under which the voided payment was made which must support the inferences which the sub-section describes, though of course those circumstances would include the creditor's knowledge of anterior events."

From the way in which the case was fought by both parties, it is clear that the parties regarded the payment of the last cheque as not having been made until 12th December 1986. This would appear to be so, having regard to the decision of the Full Court in K.D.S. Construction Services Pty. Ltd. v. National Australia Bank (1987) 5 A.C.L.C. 168 and in particular in the judgment of Ryan J. (with whom Andrews C.J. and Thomas J. agreed) at 171, where

His Honour referred to Tilley v. Official Receiver in Bankruptcy (1960) 103 C.L.R. 529 at 535 where Kitto J. said:

> "There can be no doubt that the acceptance of a payment by cheque implies, if there be nothing to the contrary, an agreement that it shall be considered as payment, subject to the condition subsequent that if the cheque be dishonoured it shall no longer be so considered."

See also on appeal to the High Court (1987) 163 C.L.R. 668 and in particular at 676 where it was held that generally speaking, when a cheque is given in payment of a debt, it operates as a conditional payment subject to a condition that the cheque be paid on presentation. If it is dishonoured the debt revives but if it is duly met, the payment is complete at the time when the cheque is accepted by the creditor.

In this case, to use the words Kitto J. (supra), there is something to the contrary. It cannot be said that at the time the cheque for $65,847.35 was handed over, it was then and there accepted as payment. A.P.A. merely held that cheque by arrangement with the company and subject to confirmation by the company as to when it should be presented for actual payment.

As indicated earlier in these reasons, I place no particular significance on the fact that the company at times paid A.P.A.'s account by two cheques instead of one, nor on the fact that the two payments in question were out of proceeds received by the company from jobs on which A.P.A. did not work at the material time. Nor do I regard the issue of plaints and writs or the sending out of computer reminder notices and telephone calls of any particular significance. Nor in my opinion is it of any significance that the company's account with A.P.A. was strictly overdue in the sense that it was not paid within the normal 30 day period. See per Kitto J., Queensland Bacon Pty. Ltd. v. Rees (supra) at 301.8, or that the company's account may have been overdue in November 1986 to

a slightly greater extent than in the 18 months up to 30th June 1986.

I do not accept the submissions of counsel for the liquidator that the handing over of the two cheques with instructions not to bank one on a specified date was the same as an instruction “Don't bank this” or “I don't have the money”, or “Not only do I not have the money, but I don't know when I'm going to get it”. Nor do I accept the submission that the effect of the second cheque was that it was a post-dated cheque and that the consequences of a deferral of the presentation of it for payment amounted to the dishonouring of the cheque. Even if this were so, care must be taken against too ready an assumption that dishonour of a cheque must in all circumstances inevitably create in the mind of a reasonably worldly-wise creditor a suspicion of insolvency. The total picture must be considered: per Kitto J, Queensland Bacon Pty. Ltd. v. Rees (supra) at 302.

So also with a post dated cheque if that was the true effect of the second cheque. There may be an innocent explanation for the issue of a post dated cheque, e.g. a debtor who will be absent when a debt will become due might issue and deliver a cheque and date it ahead on the date the debt is due, to be presented on that date. Or, if there is a temporary liquidity problem a debtor might issue a post dated cheque at a time when that problem will be cured. On the other hand, a cheque post dated when a debt is truly overdue, and not merely subject to extended credit by express or implied agreement (cf. “the friendly commercial agreement” per Young J. in Re Tellsa Furniture Pty. Ltd. (supra), may in the circumstances of a particular case be capable of supporting an inference, particularly where there is a history of difficulty in obtaining payment and other circumstances which might fairly be said to give rise to suspicion. However, as indicated, I do not accept the submissions as to the effect of the second cheque.

Applying the above principles, and fully taking into account the content of the diaries and evidence in relation thereto, I am not satisfied that the applicant/liquidator has established facts on which the court should draw the two inferences pursuant to s. 122(4)(c). Care must be taken not to be wise after the event. Facts at the time must be considered chronologically without "wariness of hindsight": per Kitto J. in Queensland Bacon Pty. Ltd v. Rees (supra) at 313. A reasonably competent businessman with all of the background knowledge possessed by Mr. O'Donnell as at 28th November 1986 and up to 12th December 1986 would not draw the inference that A.P.A. knew or had reason to suspect that at the time of either of those two payments, the company was in fact insolvent and that the effect of either payment was to give A.P.A. a preference, priority or advantage over other creditors.

Mr. O'Donnell was merely holding one cheque in accordance with the arrangement, until advised that the company had received a progress payment. This conclusion is supported by the conduct of A.P.A. subsequently in continuing to supply large credit to the company. At worst for the company, the delay in presentation of the second cheque to 12th December 1986 merely showed a temporary shortage of liquid funds although it was equally open to an inference that the company preferred to pay accounts out of liquid funds rather than from other sources.

I accordingly accept the submissions of counsel for A.P.A. This means that the conceded actual good faith on which the onus rests upon A.P.A., pursuant s. 122(2) of the Bankruptcy Act, remains undisturbed.

This leaves the question of whether one or both of the impugned payments were made in the ordinary course of business.

ORDINARY COURSE OF BUSINESS

Counsel for the liquidator, in support of the submission that the two payments were not made in the

ordinary course of business, also relied in his written submissions on the entire history of events commencing with the trading history pre-July 1986 up to the date of the actual payments. However, during argument he abandoned the history as largely irrelevant and relied only on the circumstances immediately leading up to and surrounding the actual payments themselves as disclosed by the diary entries and evidence by Mr. O'Donnell which has already been set out above. It will not now be repeated.

He also relied upon the statement of Rich J. in Downs Distributing Co. Pty. Ltd v. Associated Bluestar Stores Pty. Ltd. (In Liguidation) (supra) at 476-7, and on Freer v. Dot'n Line (Australia) Pty. Ltd. (supra) at 1309 col. 2 following the reference to Taylor v. White (1963-4) 110 C.L.R. 129. The passage in the last case however, as counsel for A.P.A. pointed out, was relevant only to the question of good faith. Reliance was also placed on Re Cummins (t/a NAM Constructions) ex parte Harris & Anor. v. A.R.C. Engineering Pty. Ltd. (1985) 62 A.L.R. 129 and in particular at 135 where Pincus J. (as His Honour then was) said:

> "I can see nothing unfair about the circumstances attending the first payment, in this case, and the payment was one which might have been made 'without having any bankruptcy in view'. On the other hand, it seems to me impossible to say that payment under a cheque which is not only post-dated, but dishonoured when first presented, falls 'into place as part of the undistinguished common flow of business' It is unusual, I think, to issue a post-dated cheque for debt which is immediately due and unusual for a cheque to be dishonoured; the combination of circumstances is doubly unusual."

It was said that the handing over of two cheques dated 28th November 1986, one to be paid immediately and the other to be held pending advice, and the circumstances leading up to the banking and payment of the second cheque on 12th December 1986 called for comment and did not fall into place in the undistinguished common flow of business.

Counsel for A.P.A. submitted that for a payment not to be in the ordinary course of business, it must be of an "unusual kind": per Latham J. in Downs Distributing Co. Pty. Ltd. v. Associated Bluestar Stores Pty. Ltd. (In Liquidation) (supra) at 475; a payment was made in the ordinary course of business if it was a transaction which would be usual for a creditor and debtor to enter into as a matter of business in circumstances of the particular case, uninfluenced by any belief on the part of the creditor that the debtor might be insolvent: per Williams J. (ibid.) pp. 479-80; or a transaction in the ordinary and common flow in the affairs of business, or falling into place as part of the undistinguished common flow of business forming part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation: per Rich J. (ibid.) 476-7.

It was submitted that the ringing of creditors asking for cheques when payments were overdue was a normal and efficient way of running a business, by continually bringing to the customer's attention the fact that the seller would like to be paid: See per Young J. in Re Tellsa Furniture Pty. Ltd. (supra) at 876. Therefore no significance should be given to the fact that there were several contacts about the cheque for $65,847.35 before it was banked and paid on 12th December 1986, or that the payments were not out of progress payments received by the company from projects on which A.P.A. may not have done work at the particular time. It was said that it was a common commercial experience that even the best customer is reluctant to part with money. It was quite usual to suppose a company would be interested in holding on to its cash as long as possible. The fact that a number of companies habitually pay late, was also said to be of significance. See also Kitto J. in Queensland Bacon Pty. Ltd. v. Rees (supra) at 301-2 (when dealing with good faith). It was further submitted that Mr. O'Donnell never threatened legal proceedings. No cheques had ever been dishonoured. Arrangements for payment were always met and that payments were being made without A.P.A. having to take any unusual

measure to effect payment. No pressure was brought to bear on Mr. O'Donnell to secure these two payments. In the result, it was said that the handing over of the two cheques, one to be paid immediately and the other some little time later, was not a transaction of “an unusual kind” or that it fell into place as part of the undistinguished common flow of business forming part of the ordinary course of business carried on. It was submitted that this clearly applied with regard to the first cheque for $80,000 but that in the circumstances it also was applicable to the ultimate banking and payment of the second cheque on 12th December 1986.

Counsel referred to several authorities. In K. & R. Fabrications (Qld) Pty. Ltd. v. M. & B. Rigging Pty. Ltd. [1982] Qd.R. 585, the Full Court held that a payment pursuant to a promise made by the promisor in response to a threat inherent in a statutory notice of demand under the Companies Act could not be regarded as a payment made according to the ordinary and common flow of transactions in the affairs of business. There was an additional factor in that case viz. the total debt was $9,724. After service of the statutory demand, a conference was held at the request of the debtor at which the debtor promised to pay $2,000 in reduction of the debt. It was in fact paid a month after the date promised. It was that payment which was held not to be a payment in the ordinary course of business.

In Katoa Pty. Ltd. (In liq.) v. Dartnall & Anor. (1984) 2 A.C.L.C. 42, payments made after receipt by the company of a monthly statement of account and carrying an adhesive label bearing the words “Final Notice” and “Payment within 7 days or legal action will be taken” were held to be payments in the ordinary course of business.

In Re Lambert Homes Pty. Ltd. (In liq) (1984) 2 A.C.L.C. 688, credit was extended to a company beyond the trading limit. Several payments were made to reduce the amount outstanding. A cheque received by the creditor was

banked and returned by the bank with advice slip “Present again funds expected”. On re-presentation it was paid. Thereafter, large purchases were transacted. It was held that the payment was made in good faith and in the ordinary course of business.

Counsel also submitted that the decision in Re Cummins (t/a NAM Constructions) ex parte Harris & Anor. v. ARC Engineering Pty. Ltd. (supra) was of no assistance as the facts of that case were quite different to the present.

The authorities dealing with particular transactions do not provide much assistance in the resolution of the current problem which depends on its own facts. The authorities make it clear that the court does not look at the particular business or course of dealings between the parties, but the general flow of the ordinary course of business: Freer v. Dot'n Line (Australia) Pty. Ltd. (supra) at 1309.7; Downs Distributing Co. Pty. Ltd. v. Associates Bluestar Stores Pty. Ltd. (In Liquidation) (supra) per Rich J. at 476-7, and per Williams J. at 480 where His Honour said:

> “It seems to me, therefore, that the expression refers to a transaction into which it would be usual for a creditor and debtor to enter as a matter of business in the circumstances of the particular case uninfluenced by any belief on the part of the creditor that the debtor might be insolvent.”

The “circumstances of the particular case” do not include the state of mind of the payer: Taylor v. White (supra) per Dixon C.J. at 136-7, per Kitto J. at 140-2, per Taylor J. at 151-2. Sub-section 122(2), as Kitto J. pointed out, refers to the rights of a “payee ... in the ordinary course of business”. Thus the sub-section requires that the payments must have presented itself to A.P.A. as fair payments to accept. What is required is the quality of ordinariness from a business point of view in the acceptance of the payments. Thus the payee must take money not only in good faith but also without there being in his

receiving the payment, anything unusual or remarkable to make it other than an ordinary business transaction.

In this context I therefore place no significance on the general history of the dealings between the parties or on matters closer to the time of the impugned transactions, such as the regularly sending out of polite computer generated reminder notices once an account was more than 15 days overdue, or the fact that a telephone call was usually made thereafter if the account remained unpaid. Nor do I regard as significant the fact that the two payments in question were said to come out of progress payments received by the company from a project on which A.P.A. had not worked at the particular material time. The source was of no concern to Mr. O'Donnell. Nor do I attach any significance to the fact that the company's account with A.P.A. was overdue for payment in accordance with the normal terms, or that two cheques, as such, were handed over on 28th November 1986. The payment or part payment of an overdue account can clearly be a payment in the ordinary course of business.

But quite apart from the matters last referred to, and looking only at the particular circumstances immediately preceding 28th November 1986 and up to 12th December 1986, I conclude that the handing over by the company to A.P.A. on 28th November 1986 of two cheques bearing that date, one for $80,000 to be banked immediately, and the other with the request to hold it pending receipt by the company of a progress payment, was a transaction entered into in the ordinary course of business, at least with respect to the cheque for $80,000. It was simply an immediate part payment of the account. It cannot be said that a cheque given in part payment was other than a payment in the ordinary course of business. I do not see how the simultaneous handing over of the second cheque with a request not to bank it until a progress payment was received, in any way affects or colours the character of the first payment. It was in my opinion a transaction into which it would be usual for a creditor and a debtor to enter as a matter of

business in the circumstances of the particular case “uninfluenced by any belief on the part of the creditor that the debtor might be insolvent” or one which might have been made “without having any bankruptcy in view”. The payment of $80,000 on presentation on 1st December 1986 was therefore a payment made in the ordinary course of business. A.P.A. has discharged the onus on it of establishing this fact.

This leaves the question of the second cheque for $65,847.35 which was not banked and paid until 12th December 1986. It was to be held pending receipt by the company of a progress payment. Whether the payment of it on 12th December 1986 was a preference must be judged by events at that time, having regard to what occurred since 28th November 1986. The details of those events have already been set out.

Whilst the diary entries are not entirely clear, Mr. O'Donnell, when he was initially handed that cheque, was requested to hold it until a progress payment was received. On Thursday, 4th December 1986, he was then requested to hold the cheque for Wednesday which must have meant Wednesday, 10th December 1986. The diary entry and the evidence of what occurred on 10th December 1986 is imprecise, but on the balance of probabilities, Mr. O'Donnell made that entry ahead on 4th December 1986. He probably also spoke to Mr. Fitzgerald about the cheque that day. He then rang the company on Thursday, 11th December 1986 to inquire about the cheque. The time of that telephone call does not appear. He was also probably told on 12th December 1986 that the cheque could then be banked.

The onus of proving that this payment was a payment made in the ordinary course of business is on A.P.A. The cheque was handed over on Friday, 28th November 1986 and bore that date but it could not then be banked (or on the next business day on Monday, 1st December 1986 as with the cheque for $80,000). It was not post-dated. There was a request to hold it until a progress payment was received

which, according to Mr. O'Donnell's general evidence, meant a “few days”. Apart from the particular practice which existed between A.P.A. and the company, it might generally be thought to be somewhat unusual that a debtor would hand over a cheque currently dated into the care of a creditor, rather than hand over a post-dated cheque or simply not hand over a cheque at all unless the debtor was going to be absent for some time after that date, of which there is no evidence.

There were further contacts about the cheque on Thursday, 4th December 1986 when Mr. O'Donnell was asked to hold the cheque till Wednesday, 10th December 1986, on Wednesday, 10th December 1986, on Thursday, 11th December 1986 and probably again on 12th December 1986. Notwithstanding that Mr. O'Donnell was “uninfluenced by any belief . . . that the debtor might be insolvent”, I am unable to conclude on the balance of probabilities that A.P.A. has discharged the onus of showing that on 12th December 1986, it was a payee in the ordinary course of business in respect of the sum of $65,847.35. The combination of circumstances meant that the handing over of the dated cheque and the ultimate payment of it twelve or fourteen days later called for comment and did not fall into place as part of the undistinguished common flow of business. The particular course of dealing between these two parties, and Mr. O'Donnell's belief is of no assistance to him on this aspect of the case.

The result is that this payment amounted to a preference. The precise sum is to be determined by reference to the running account. The indebtedness immediately before that payment was $163,687.62 (exs. 19, 27), so that the claim for a preference is $38,837.59 if the sum owing as at 13th April 1987 is to be deducted ($124,850.03), or nil if the relevant sum is the balance owing when the running account was finally closed on 16th July 1987 (i.e. $169,044.93). The relevance of the running account must now be considered

RUNNING ACCOUNT

It was not disputed that A.P.A. operated a running account with the company and that the liquidator was entitled to chose the peak indebtedness during the six months' period prior to the deemed commencement of the winding-up, from which to ascertain whether in the running account there was a preferential payment thereafter: Rees v. Bank of New South Wales (1964) 111 C.L.R. 210 per Barwick C.J. at 221. The dispute related to whether the running account should, for the purposes of this exercise, end at the commencement of the winding-up on 13th April 1987 or whether the relevant time was 16th June 1987 when actual trading between A.P.A. and the company ceased. No authorities were drawn to my attention which have expressly decided this issue. All authorities dealt with the situation where the running account in fact came to an end at or before the deemed commencement of winding-up.

Counsel for A.P.A. submitted that the authorities established that the “entire transaction” comprising the running account has to be considered as a whole, and that no payment can be considered in isolation from another. It is the net effect from the “peak indebtedness” within the relevant period to the end of trading on the account that is to be considered when ascertaining the amount of the preference. Merely because legislation “deemed” a liquidation to commence on a certain date, the law does not deem trading to stop, or to alter the legal basis of the trading relationship between the parties: National Acceptance Corporation v. Benson (1988) 12 N.S.W.L.R. 213 at 221. The parties can lawfully continue to trade after the deemed commencement of the winding-up. There was no warrant for arbitrarily closing the account at the date liquidation was deemed to have commenced.

The above conclusion was said to be derived from Richardson v. Commercial Banking Company of Sydney Limited (1951) 85 C.L.R. 110 at 129 in the joint judgment of the Court:

"... there are two things that it is important to have clearly in mind. One of them is the kind of 'effect' which the provision treats as decisive. It must be 'the effect of giving the creditor a preference, a priority or advantage over other creditors': it is then void in bankruptcy if the sequestration is within six months ...

The second thing is that the effect is the consequence of the payment and that where the payment forms an integral, an inseparable, part of an entire transaction its effect as a preference involves a considerable of the whole transaction."

Also from Rees v. Bank of New South Wales (supra) per Barwick C.J. at 220:

"In this case the challenge is not to individual payments . . . But at the time of the receipt of each deposit during the relevant period, the bank was able to retain at least some portion of it in permanent reduction of its account. What part it did retain can be determined by taking the total intake into the account during the period and deducting the outgo. It is unnecessary to endeavour to assign this remainder to particular deposits, for the position as to the bank's knowledge in relation to the company's insolvency and in relation to the effect of any permanent reduction in the company's indebtedness to the bank was the same throughout the period. Nor is there any need to analyse the course of the overdrawn account during the period to determine whether a preference which had been obtained at one point of time was foregone by the making of further advances which for the time being may have exceeded the extent of the preference. It is sufficient in the circumstances of this case to take the overall effect of the deposits and the withdrawals in the period."

And per Kitto J. (ibid.) at 222:

"Richardson's Case having decided that the effect referred to in subs. (1) is the ultimate effect in a case where the payment formed an integral step in a unified course of payments and counter-payments, ..."

See also Queensland Bacon Pty. Ltd. v. Rees (supra) at 285-6 and Re Weiss; ex parte White and John Vicars and

Co. Ltd. (supra) per Gibbs J. particularly at 657-600. His Honour said at 657:

> "It is clear that for the purpose of deciding whether a payment is void within s. 95(1) of the Bankruptcy Act it is effect in fact of the making of the payment that is decisive. It is also clear that in some cases, where the payment forms part of a wider transaction, or where it is sufficiently connected with other items in a running account, it is the effect on the whole transaction, of all the connected items, that has to be regarded."

It was submitted that "the whole transaction", or "entire transaction" meant the entire course of dealings between the parties whenever it in fact came to an end. It was said that this followed notwithstanding that s. 368 rendered all payments by the company after the deemed commencement of the winding-up void (i.e. not voidable). It was also submitted that the remarks of the Court of Appeal of New South Wales in Tellsa Furniture Pty. Ltd. (In Liquidation) v. Glendave Nominees Pty. Ltd. (1987) 9 N.S.W.L.R. 254 which indicated that under s. 368, s. 451 principles did not apply, is not authority for the converse i.e. that when looking at the effect of a preference, one must look at the "entire" transaction or the "whole" transaction of a running account even if it does not come to an end until after the commencement of the winding-up.

Counsel for the liquidator submitted that the proper comparison for preferences is the balance at the date of commencement of the winding-up with peak indebtedness. He relied upon Rees v. Bank of New South Wales (supra) per Barwick C.J. at 220-1 as follows:

> "It was also said in argument for the bank that it was not permissible for the liquidator to choose a date within the period of six months and to make a comparison of the state of the overdrawn account at that date and its state at the date of the commencement of the winding-up. It was submitted that the proper comparison was between the debit in the account at the commencement of the statutory period of six months and the debit at the commencement of the liquidation - a comparison which in this case would result in a materially lesser figure than

> that reached by taking the liquidator's comparison. In my opinion, the liquidator can choose any point during the statutory period in his endeavour to show that from that point on there was a preferential payment and I see no reason why he should not choose, as he did here, the point of the peak indebtedness of the account during the six months period."

It was further submitted that what happens after commencement of the winding-up is the particular province of s. 368 which declares that all payments made thereafter are void unless those payments are validated in the discretion of the court in circumstances where the provision of goods or services by a creditor produces a benefit to the company. It was said that it would work an absurd result where a running account was paid off by payments after the commencement of the winding-up and the creditor was successful in having those payments validated under s. 368 as a matter of discretion because a liquidator could then seek back all the validated payments in a preference action pursuant to s. 451 by comparing the nil balance at the close of business with peak indebtedness before the commencement of the winding-up. In a preference claim the court does not have a discretion not to declare a preference if the necessary facts are established, as exists under s. 368(1). This would be so even if validation occurred as it can before the winding-up order is made (s. 368(2)).

It was further said that a creditor can succeed with validation and fail in a preference action. Notwithstanding a creditor's knowledge prior to the winding-up, which might indicate a lack of good faith and a preference, goods and services rendered after the commencement of the winding-up may have improved the company's position so that the payments made after the commencement of the winding-up may well be validated. It followed according to the submission that s. 451 and s. 368 should operate independently of one another because to validate only those payments which were not s. 451 preferences would unduly restrict the discretion to be exercised under s. 368. He relied on Tellsa Furniture

Pty. Ltd. v. Glendave Nominees Pty. Ltd. (supra) per Priestly J.A. at 260, 261-263, and Re Allan Fitzgerald Pty. Ltd. (In liq) [1989] 2 Qd.R. 495 and in particular on the remarks of Matthews J. at 501.

See also Re Rampton Holdings Pty. Ltd. (In Liquidation) (1991) 9 A.C.L.C 220; Sheahan & Anor v. Piber Contractors Pty. Ltd. (1991) 9 A.C.L.C. 17; Re Transconsult Australia Pty. Ltd. (In Liq.) (1991) 9 A.C.L.C. 1052; and National Acceptance Corporation Pty. Ltd. v. Benson & Ors (supra) where Priestly J.A., with whom Kirby P. and Clarke J.A. agreed, confirmed the views expressed in Tellsa Furniture Pty. Ltd. v. Glendave Nominees Pty. Ltd. (supra) that since s. 451 of the Code came into operation, it is only the period of six months prior to the presentation of winding-up process to which the preference provisions apply and that thereafter only s. 368 is to apply.

The matter is not without difficulty. It is clear that there can only be a preference with respect to a payment within the six months' period prior to the deemed commencement of the winding-up. All of the authorities and statements made were in the context of a running account which in fact had come to an end at or prior to the commencement of the winding-up. It is difficult to ascertain from the various judgments, any positive indication that the “entire transaction” or “whole transaction” included trading which continued after the deemed commencement of the winding-up. Indeed, if anything, there are indications to the contrary. In Queensland Bacon Pty. Ltd. v. Rees (supra), the approach by Barwick C.J. to the question of running accounts generally, appears to be prefaced by his remarks at 282 where His Honour posed the question as to whether the immediate effect of a payment to one creditor and not to others was taken as the relevant effect or whether those payments should be regarded as “part of the overall series of not unrelated transactions recorded in the running account so that the net effect of the operations from the date of the first impugned payment to the date of liquidation becomes the determinate both of

the fact and of the extent of preference" (my emphasis). And further, he said:

> "But there will be occasions when there will be such facts or events intervening between the first payment which is impugned and the commencement of the liquidation as will require the limiting dates to be different, the terminal date for consideration of the state of the running account being for that reason earlier than the date of the commencement of liquidation."

Whilst that passage is not conclusive, it seems to me to be consistent with the submissions of counsel for the liquidator. In my view, s. 451 and s. 368 operate quite independently of each other. Preferences during the six months prior to the commencement of the winding-up can be attacked only under s. 451. A creditor who supplies credit to a debtor after commencement of the winding-up does so at his own risk as to payment therefor, whether the supply is on a running account or by way of isolated transactions. Payments after commencement of the winding-up, whether in respect of pre-liquidation or post-liquidation debts, are void unless validated. There seems to be no good reason to distinguish a creditor who supplies credit after commencement of liquidation on a running account, and a creditor who supplies credit by way of isolated transactions, or in a way other than by way of a running account.

If the running account were to continue on past the date of the deemed commencement of the winding-up, for the purpose of calculation of preference, it could lead to consequences of the kind referred to by counsel for the liquidator. Having regard, to the scheme of the Act envisaged by s. 451 on the one hand and s. 368 on the other, it seems to me that the submissions of counsel for the liquidator ought to be accepted.

In the result, I conclude that the running account, for the purposes of calculation of any preferences during the six months' period leading up to the deemed commencement of liquidation, may continue up to the date of

commencement of the liquidation only. This means that there is a preference in the sum of $38,837.59 being the difference between the peak indebtedness of $163,687.62 immediately before the payment of $65,847.35 on 12th December 1986 and the sum of $124,850.03 owing as at the date of the deemed commencement of winding-up on 13th April 1987. The liquidator is entitled to a declaration with respect to this sum, subject to the question of interest to be considered subsequently.

This leaves the question of whether or not any or both of the two payments made by the company to A.P.A. after 13th April 1987 should be validated.

VALIDATION

The sums in question were for pre-liquidation debts. $12,124 was paid on 15th April 1987 and was for work done in January 1987. $29,478.13 was paid on 21st May 1987 and was for work done in February 1987. See exs. 27, 31.

The total of $41,602.13 represents approximately one third of the total pre-liquidation debt of $124,850 owing at 12th April 1987 (ex. 27). Since 13th April 1987, work performed by A.P.A. for the company was valued at $86,297.03. Of that sum, work to the value of $36,273.94 was performed by A.P.A. for the company after the last payment to A.P.A. on 21st May 1987 and up to 16th June 1987. (Ex. 27). By that date the company's debt increased $44,694.90 from 13th April 1987, to $169,544.93. The particular jobs on which A.P.A. worked for the company appear from ex. 27. The great bulk of post-liquidation work was performed by A.P.A. for the company after 13th April 1987 at Callide on a project for the Queensland Electricity Commission which during this period made significant progress payments to the company. Exhibit 27 also shows that A.P.A. did work for the company on other projects in respect of which the company also received progress payments.

Counsel for A.P.A. relied principally upon the submission that there was considerable benefit to the creditors and to the company generally, flowing from those payments to A.P.A. which meant that the company was able to continue with its projects and earn $4,678,590.30 as progress payments which would otherwise have been lost to the company had A.P.A. withdrawn its services at an earlier stage; upon lack of knowledge by Mr. O'Donnell of the existence of the winding-up application until the end of April 1987; upon his reasonable belief after proper inquiry that the application was not to be proceeded with and that the debt had in fact been compromised and paid by the company; that Mr. O'Donnell had no knowledge of the substituted creditor until early June 1987; that Mr. O'Donnell did not have knowledge of the financial position of the company until well into June 1987 and at all times had acted in good faith; and A.P.A. would suffer hardship if the payments were not validated.

Counsel for the liquidator submitted that there was insufficient evidence to find that a benefit to the creditors as a whole had been proved; the mere receipt of payments to the company was insufficient because the contract or contracts to which the payments related may have been unprofitable. There had been no proof by A.P.A. on whom the onus lay that the company had earned an accounting profit as a result of the progress payments received by the company and Mr. Knight said that “at the day of the winding-up there was a further deterioration”. A.P.A. had not shown that the payments received after 13th April 1987 reversed this trend. The payments received merely allowed the company to make extensive void payments to other creditors of the company (see ex. 6 - cash payments journal). It was also said that A.P.A. had not in the circumstances acted in good faith.

He further submitted that there was no sufficient evidence of hardship and that in any event, it should be ignored as irrelevant having regard to the New South Wales of Court of Appel decision in Tellsa Furniture Pty. Ltd. v.

Glendave Nominees Pty. Ltd. (supra). This latter submission is not substantially different to that of counsel for A.P.A. who agreed that if hardship was relevant, it attracted very little weight.

Some dispute occurred over the question of good faith, because of the concession by counsel for the liquidator that A.P.A. had actual good faith with respect to all payments it received prior to the commencement of liquidation on 13th April 1987. It was submitted by counsel for A.P.A. that it was difficult to see, in the light of this concession, which presumably existed up to 13th April 1987, how there could be a sudden lack of good faith on 15th April 1987, when the first payment was made after liquidation. It was conceded by counsel for the liquidator that Mr. O'Donnell had no knowledge then of the application to wind-up. Whilst I was concerned as to the effect of this concession, I have proceeded on the basis that counsel for the liquidator did not intend to abandon the question of good faith post-liquidation.

He relied on the entire chronology of events to negative good faith i.e. on events commencing from the period prior to 30th June 1986 and further submitted that Mr. O'Donnell's explanation for ignoring the application for winding-up when it first came to his knowledge prior to the last payment on 22nd May 1987 was insufficient; that A.P.A. knew of a judgment in the Gazette on 11th April 1987; that there was an admitted indebtedness to the Haywoods as initial applicants in the winding-up even though the amount was disputed; that Mr. Fitzgerald indicated on 1st May 1987 the need to re-finance his equipment; that A.P.A. knew since 26th March 1987 that the company owed a Biloela hotel account for about $6,000; and that A.P.A. did not bring the application for validation until the liquidator commenced proceedings and should have applied immediately and certainly when demand was made on A.P.A. by the liquidator on 2nd February 1988 (ex. GSAP A3 to Mr. Starkey's affidavit).

The foregoing and other matters relied upon to negative good faith were said to arise from further entries in the diaries and the evidence of Mr. O'Donnell as follows. Each is dealt with seriatim. The two payments are included.

1. 29th January 1987. “John Armstrong re Fitzgerald is he in trouble”. It was suggested to Mr. O'Donnell that he rang Mr. Armstrong with this inquiry. I have no hesitation in accepting Mr. O'Donnell's explanation that Mr. Armstrong rang him to ask whether the company was paying its accounts. He was merely seeking a credit reference which-Mr. O'Donnell gave him by indicating that A.P.A. was having no trouble in its dealings with Mr. Fitzgerald. This telephone call did not cause Mr. O'Donnell any concern or in any way cause him to re-appraise his view of the company's financial capacity. I also accept as relevant to his belief, Mr. O'Donnell's explanation that Mr. Armstrong was a competitor of Mr. Fitzgerald and may have been hoping that Mr. Fitzgerald “would not be around when the next Queensland Railway account came up”. He said that this was common practice in the construction industry where people rang other operators for various reasons quite unrelated to financial difficulty.

2. 19th February 1987. “Fitzgerald payment November”. “Gail said Monday 9 March”. This was simply one of Mr. O'Donnell's normal telephone calls.

3. 27th February 1987. “Alan Fitzgerald”. “Cash” was inserted separately by pencil. “Had a good month”. I accept Mr. O'Donnell's evidence that Mr. Fitzgerald rang him at night from Gladstone and was speaking operationally rather than on matters relating to his finances. This fits in with the previous telephone call to or from Gail Colb on 19th February 1987. The pencil entry “Cash” does not on its face,

necessarily refer to Mr. Fitzgerald, and Mr. O'Donnell said that he could recall no conversation about money at all on this occasion and had no idea what the notation “Cash” referred to.

4. 9th March 1987. “Fitzgerald payment November and December”. This entry could have been made on 19th February 1987 or on 9th March 1987. It was put to Mr. O'Donnell that the reference to Ken and Don Haywood related to their politics. I accept Mr. O'Donnell's evidence that he had no idea of the political standing of Mr. Fitzgerald. It is difficult to see the relevance of this suggestion put to Mr. O'Donnell. He said that there were no rumours whatsoever of the company's viability.

5. 18th March 1987. “Never paid subbies. Not paid since Xmas. Believe $32,000”. “3 trucks B/O caught up to Gladstone. All the D6's repossessed $300,000”. I accept Mr. O'Donnell's evidence that this was not a reference to the company's moratorium as put to him. I also accept that Mr. O'Donnell did not learn of any moratorium of the company until well after the winding-up order, and that this diary note and the separate notation “Some finance coys are backing off and all finance coys are starting to screw”, referred to a company, M.J.M. which went into liquidation in June 1987 and owed money to A.P.A. which Mr. O'Donnell had been attempting to collect. See ex. 31.

6. 19th March 1987. “Meeting with Fitzgerald”. This was in pencil writing and was obviously inserted at a different time to the entry following in ink which said “Neil Rosenlund - Brisbane”. Mr. O'Donnell denied that this was a meeting between himself, Mr. Fitzgerald and Mr. Rosenlund who was a customer of A.P.A. There is no reason not to accept Mr. O'Donnell's evidence.

7. 26th March 1987. “Biloela Hotel A/c to paid on receipt”. “Fitz = owes $6,000”. Mr. O'Donnell denied that this meant that the Biloela hotel account was unpaid by Mr. Fitzgerald. Rather it was a contact by one of A.P.A.'s subcontractors to say that they had moved from the caravan park into the Biloela hotel. After the statement of affairs of the company (prepared after liquidation - dated 10th August 1987) was shown to Mr. O'Donnell indicating a debt by the company to the Biloela hotel in the sum of $6,159, Mr. O'Donnell agreed that the reference to $6,000 was probably a reference to the fact that the company owed $6,000 to that hotel. As pointed out by counsel for A.P.A., at best this indicated that there was a sum of $6,000 owed by the company to the Biloela hotel and not that the company was not paying its accounts.

   Something was made of the further notation that day “what an absolute shit of a day”. I regard this reference as irrelevant.

8. 10th April 1987. “Fitzgerald's cheque” and “Gail, A.P.A. tippers - Fitzgerald - re”. Mr. O'Donnell said that this could have been a telephone call either way. There is no evidence of the details.

9. 14th April 1987. “Alan Fitzgerald chq”. Again this represented a telephone call either way and accords with Mr. O'Donnell's usual practice.

10. 15th April 1987. A cheque for $12,124 received by A.P.A. from the company.

11. 29th April 1987. “See Allan Friday”. “CPA ... “. Mr. O'Donnell said that this was a reference to “certified practising accountant”. Possibly this entry referred to a meeting with Mr. Fitzgerald on Friday, 1st May 1987.

12. 1st May 1987. This entry is in pencil “Fitzgerald” “finance - Re-finance the whole outfit” “Ken and Don Haywood accountants filed sect 222 notice - payments $50 for six months work Alan claims it should be about $8”. (This means $50,000 and $8,000 respectively.)

    “3578322 Haywood - no judgment - threatened to issue ...?”

I accept that Mr. O'Donnell did not learn of the application to wind-up until the end of April or 1st May 1987, that he enquired of the accountants who confirmed that there was no judgment and that he contacted Mr. Fitzgerald who told him the matter was contested. I accept that Mr. O'Donnell had learned that the company had compromised the dispute and believed that the company had paid the accountants $10,000 in settlement. He did not assent to the proposition that the s. 222 notice indicated that the company was in financial trouble.

As to the reference to “Re financing the whole outfit”, on which reliance was placed by counsel for the liquidator to indicate lack of good faith with respect to the second payment on 22nd May 1987, Mr. O'Donnell said that he was told by Mr. Fitzgerald that the company intended to terminate small leases over various items of equipment with some of the smaller finance companies and to get one of the larger companies to consolidate the leases. It was not a conversation as to Mr. Fitzgerald's financial position. Mr. O'Donnell did not know whether the $6,000 owing to the Biloela hotel had been paid. There is no reason not to accept Mr. O'Donnell's explanation as to what occurred on that date, and that it gave him no cause for concern.

13. 15th May 1987. “Alan Fitzgerald chq”. Mr. O'Donnell rang for a cheque in accordance with his normal procedure.

"No fuel - Pulled out - operations - no fuel - Fitzgerald fuel". Mr. O'Donnell said that this meant that A.P.A.'s subcontractors at Biloela were using Mr. Fitzgerald's fuel because by the time they finished work it was too late to go to the fuel depot at Biloela. A.P.A. did not supply fuel to its subcontractors. That was their business expense and not A.P.A.'s. Mr. O'Donnell said that the reference probably meant that the subcontractors had made their own arrangements with Mr. Fitzgerald and paid him themselves as they were obliged to do. There is no reason not accept this explanation.

14. 22nd May 1987. Second payment of $29,478.13 paid.

15. 30th May 1987. The date is struck out and June 13th inserted. The significance of the altered date is not readily apparent. In evidence-in-chief, Mr. O'Donnell said that he learned of the substitution of Kimela Pty. Ltd. as applicant/creditor "around about" 6th June 1987, that he contacted Mr. Fitzgerald concerning this and was told by Mr. Fitzgerald that there was no money owed to Kimela Pty. Ltd. but that it belonged to Mr. Alec Tenkate. There are no diary entries on 2nd June 1987, 4th June 1987, 5th June 1987 up to 8th June 1987. The entry on 30th May 1987 (altered to June 13th), indicated that the money was not owed to Frank Tenkate (Kimela Pty. Ltd.) but was owed to Alec Tenkate for a job on the gateway and that a subcontractor's charge was entered, the money being held by CMP, being an organisation for which the company had done work.

This indicates that not earlier than 30th May 1987, Mr. O'Donnell learned of the substituted creditor and discussed the matter with Mr. Fitzgerald. He was told that there was no debt owing to the substituted creditor but that the money in question was held by CMP (apparently as employer pursuant to the Sub-Contractors Charges Act) for

the person who was entitled to it. It does not matter whether Mr. O'Donnell learnt of the substituted creditor on 30th May 1987 or at some later time. From the chronology, counsel for the liquidator appears to have accepted that it was 6th June 1987 (shown as 6th May 1987 in error). It occurred well after the last payment in question of $29,478.13 on 21st May 1987. Mr. O'Donnell was entitled to regard as reasonable, the explanation given to him by Mr. Fitzgerald. He continued to provide trucks regularly for the company after that date up to 17th June 1987 and later diary entries indicate that he continued with the practice of contacting Mr. Fitzgerald over payments. The entry on 9th June 1987 indicates that he was still expecting payments from the company. He was given a further cheque about 6th June 1987 which was unpaid when the provisional liquidator was appointed.

The pencil notation at the front of the 1987 diary was largely left unexplained. Mr. O'Donnell said in evidence-in-chief that he could not recall having written the notation although it was in his hand-writing. He said it may have involved an informal meeting with some of his subcontractors. The notation is as follows:

> “Strategic Plan in event of Fitzgerald Collapse June 1987 formulated 28th May 1987.
>
> Debt Approximately $180,000”

Then appears four options. There was no cross-examination as to this entry or evidence as to when it was in fact inserted in that diary.

Exhibit 27 shows that the debt to A.P.A. never reached $180,000 at any time after 1st December 1986. On 28th May 1987 the debt was only $148,151.13. During the period from 13th April 1987, it progressively increased by $44,694.90, even allowing for the two payments of $41,602.13, to a total of $169,544.93 as at 16th June 1987. This gives some support for the suggestion that the entry was inserted later, but even if it indicates that there was a suggestion

on 28th May 1987 that the company might be facing financial difficulties, this still occurred well after the last payment on 21st May 1987 and is not inconsistent with Mr. O'Donnell's evidence that he did not know of the financial difficulties of the company until very close to the time when the provisional liquidator was appointed. He continued to supply trucks on credit after 28th May 1987. After that date, the company's debt increased by $21,393.80 to 16th June 1987.

I have already referred to the history of events up to 12th December 1986. I have indicated that I place little if any significance on the fact that Mr. O'Donnell had notice of the issue of various plaints and writs and indeed of one judgment against the company on or about 11th April 1987. Nor do I regard as significant the fact that computer reminder notices were sent out automatically when all accounts became more than 15 days overdue, or that overdue accounts were followed up by a telephone call. This system occurred month by month. It was proper business practice. Nor do I regard it as of any particular significance that Mr. O'Donnell was prepared to give extended credit to the company beyond the period of the 30 day credit account. Of significance is the fact that A.P.A. continued to supply credit to a substantial extent right up to the date of appointment of the provisional liquidator during which period the amount of the company's debt to A.P.A. increased.

It was conceded and I find that Mr. O'Donnell had no knowledge of the application for winding-up when the first payment was made on 15th April 1987. In my opinion, that payment was made in good faith and in the ordinary course of business, and for valuable consideration. I place no significance on the fact that Mr. O'Donnell had allowed the account to become overdue to the extent it was at that time. As to the second payment, Mr. O'Donnell carefully looked into the question of the application for winding-up when it first came to his knowledge at the end of April 1987 and not unreasonably came to the view that it would

not proceed. He knew that the debt had been compromised and paid. This was his belief at the time the second payment was made on 22nd May 1987. In my opinion, that payment was also made in good faith and in the ordinary course of business and for valuable consideration.

It was not submitted on behalf of the liquidator that the test of good faith to be applied in a validation proceeding post-liquidation was the same as that which applied pursuant to s. 122(4)(c) of the Bankruptcy Act viz. not what the particular creditor knew or believed but what a reasonable man, possessed of all the knowledge and circumstances possessed by the creditor, would reasonably have believed or suspected in the circumstances.

In Re Allan Fitzgerald Pty. Ltd. (In Liq) (Full Court) (supra), a case very different to the present, there had been a long history of difficulty experienced by a creditor (A.G.C.) in obtaining payments for lease rentals from the company. In January 1987 the company fell into arrears. Various meetings occurred between the company and A.G.C. when it became obvious that the company had grave difficulties in meeting its financial obligations. Between 13th April and 20th June 1987 A.G.C. threatened to repossess the equipment if lease payments were not received. Matthews J. at 501 on the facts of the case said that the payments were outside the ordinary course of business but importantly it could not be said that A.G.C. had acted with good faith as that term was understood in insolvency proceedings. This appears to have been the view of Vasta J. on a close reading of His Honour's remarks at 508. It would appear that the court there looked at the question of good faith on the basis of what A.G.C. in fact knew. The test is a subjective one. But even if the test is objective, I would have no hesitation in concluding that on the facts of the case as known to Mr. O'Donnell at the time of each of the two payments, no reasonable and worldly-wise businessman would have concluded that A.P.A. knew or had reason to suspect that the company was unable to pay its debts as they fell due and that the effect of either

payment would be to give A.P.A. a preference, priority or advantage over other creditors.

The question then is whether or not one or both of the payments should be validated pursuant to s. 368(1).

The principles relevant to this case appear from the various authorities as follows:

1. The onus of proof is on the applicant for validation: Re Atlas Truck Services Pty. Ltd. (1974) 24 F.L.R. 220 at 225. Re Allan Fitzgerald Pty. Ltd. (In Liq) (supra) per Kelly A.C.J. at 500.

2. The court has a wide and unfettered discretion whether or not to validate such payments: Re Steane's (Bournemouth) Ltd. [1950] 1 All E.R. 21 at 25 per Vaisey J., as applied by Sach L.J. in Re Clifton Place Garage Ltd. [1970] 1 Ch. 477 at 492, and by Fox J. in Re Atlas Truck Services Pty. Ltd. (supra) at 221-2. See also Jardio Holdings Pty. Ltd. v. Dorcon Constructions Pty. Ltd. [1984] 3 F.C.R. 311 at 316; Tellsa Furniture Pty. Ltd. (In Liq) v. Glendave Nominees Pty. Ltd. (supra) at 255 per Mahoney J.A.; Re Allan Fitzgerald Pty. Ltd. (In Liq) (supra) per Vasta J. at 508.

3. The discretion is not limited by classification of acceptable dispositions. It must depend upon the facts of each case: Tellsa Furniture Pty. Ltd. (In Lig) v. Glendave Nominees Pty. Ltd. (supra) per Mahoney J.A. at 255; Re Atlas Truck Services Pty. Ltd. (supra) per Fox J. at 221.

4. The basic consideration is that the purpose of the liquidation is to divide the assets, consisting of a fund which crystallises at the commencement of liquidation, rateably amongst the creditors. Whilst this factor is of importance, it is not decisive. To depart from the principle there must be reasons which warrant that departure: Tellsa Furniture Pty.

Ltd. (In Liq) v. Glendave Nominees Pty. Ltd. (supra) per Mahoney J.A. at 255; per Priestly J.A. with whom Hope J.A. agreed at 261; Re Tellsa Furniture Pty. Ltd. per Young J. at 874; Re Allan Fitzgerald Pty. Ltd. (In Liq) (supra) (Full Court); Jardio Holdings Pty. Ltd. v. Dorcon Constructions Pty. Ltd. (supra) at 316-7.

5. The court should look at the application not only through the eyes of the applicant, but also through the eyes of the company and the creditors generally: Re Clifton Place Garage Ltd. [1970] 1 Ch. 477 at 492; Re Tellsa Furniture Pty. Ltd. (supra) per Young J. at 871

6. The fact of insolvency of the company or that the company incurred considerable losses as a result of the ultimate liquidation or that other creditors were not paid during the period, are not decisive factors: Jardio Holdings Pty. Ltd. v. Dorcon Constructions Pty. Ltd. (supra) at 319-320.

7. Knowledge at the time of the transaction of the presentation of a petition, and that a winding-up order may be made, is not fatal to the success of an application for validation: Re Atlas Truck Services Pty. Ltd. (supra) at 222-3; Re Park Ward & Co. Ltd. [1926] 1 Ch. 828.

8. Good faith in the payee is an important if not decisive factor: Re Tellsa Furniture Pty. Ltd. (supra) per Young J. at 874; Mahoney J.A. at 256, Priestly J.A. at 263; Re Atlas Truck Services Pty. Ltd. (supra) per Fox J. at 221; Re Allan Fitzgerald Pty. Ltd. (supra) per Matthews J. at 501. Accordingly, a disposition carried out in good faith at a time when the payee was unaware that a petition has been presented will normally be validated.

9. However, payments made in good faith and in the ordinary course of business and for valuable

consideration are relevant factors but a counter-veiling benefit to the company must usually be demonstrated: Sheahan & Anor v. Piber Contractors Pty. Ltd. (supra); Re Tellsa Furniture Pty. Ltd. (supra) per Young J. at 874; Mahoney J.A. at 256.

10. The fact that post-liquidated payments discharge pre-liquidation debts is not decisive against validation. The court in appropriate circumstances may validate in full a pre-liquidation debt which constitutes the necessary part of a transaction which as a whole is beneficial to the general body of creditors and the company: Re Atlas Truck Services Pty. Ltd. (supra) per Fox J. 224-5; Re Tellsa Furniture Pty. Ltd. (supra) per Young J. at 874; per Priestly J.A. at 263. Benefit to the company so as to enable the company to be sold as a going concern is not a relevant consideration: Re Tellsa Furniture Pty. Ltd. (supra) per Young J. at 873; per Priestly J.A. at 261.

11. The essential question is whether the transaction could, at the time of its occurrence, and without the benefit of hindsight, reasonably be perceived as offering some advantage or potential advantage to the company and its general body of creditors. It is necessary to weigh the benefits to the respondent against the detriment to the general body of creditors: Jardio Holdings Pty. Ltd. v. Dorcon Constructions Pty. Ltd. (supra). The inquiry under s. 368(1) is essentially a commercial or economic one, calling for a balancing of the anticipated net gains or losses from the transaction for which approval is sought: Jardio Holdings Pty. Ltd. v. Dorcon Constructions Pty. Ltd. (supra) at 317.

12. The advantage or potential advantage to the company and to its general body of creditors may be demonstrated where the payments were related to any

need to continue business, and earn income or save loss during dependency of the petition:

Re Atlas Truck Services Pty. Ltd. (supra) per Fox J. 225.

> "In the exercise of this power, the court will take into account whether the payment, and the transaction of which it is part, was or was apt to be for the benefit of the creditors in question. It will, in general, see the continuation of the company's business as, in the proper case, for their benefit.": per Mahoney J., Tellsa Furniture Pty. Ltd. (In Liq) v. Glendave Nominees Pty. Ltd. (supra) at 257.

13. Hardship to the creditor if validation is not ordered is irrelevant: Tellsa Furniture Pty. Ltd. (In Liq) v. Glendave Nominees Pty. Ltd. per Priestly J.A.

Mr. O'Donnell said in evidence which I accept that there was a mutual assumption between the company and A.P.A. of continuation of the relationship which existed between them. That relationship presupposed that providing payments were made from time to time, A.P.A. would continue to supply trucks on credit to the company. An analogy was drawn with the remarks of Barwick C.J. in Queensland Bacon Pty. Ltd. v. Rees (supra) at 285-6 when in dealing with the nature of a running account, the Chief Justice said that the basis of payments did not have to depend on some express arrangement between the parties which made the ensuring of service and supplies an express purpose of the payments. His Honour said at 286:

> "... it is enough if, on the facts of any case, the court can feel confident that implicit in the circumstances in which the payment is made is a mutual assumption by the parties that there will be a continuance of the relationship of buyer and seller with resultant continuance of the relation of debtor and creditor in the running account ..."

Such analogy was sought to be drawn in Re Allan Fitzgerald Pty. Ltd. (In Liq) (supra) where Queensland Bacon Pty. Ltd. v. Rees (supra) was distinguished by Matthews J. at 501 on the facts. Absence of good faith was of significance. His Honour did not say that the analogy would not be applicable in an appropriate case. Kelly A.C.J. (who dissented), thought the analogy was appropriate and said that the payments were of the nature of "genuine payments made to reduce a general debit as it stood from day to day, and in order to maintain a genuine business relationship that gave promise of advantage to both debtor and creditor": Re Baronga Nominees Pty. Ltd. (In Liq) (1983) 8 A.C.L.R. 265 at 273.

I have indicated that the continuance of the provision of trucks by A.P.A. to the company was an essential component in the ability of the company to continue with its extensive projects.

I have already indicated that I accept Mr. O'Donnell's evidence that A.P.A. was a leader in the industry and that if it ceased working for the company word would have quickly spread and it would have been very hard if not impossible for the company to get trucks. The consequences if such had occurred, have already been referred to.

In my opinion, sufficient has been demonstrated to warrant a departure from the principle that the purpose of the liquidation is to divide the assets rateably amongst the creditors. The payments in question could at the time they were made, and without the benefit of hindsight, reasonably be perceived as offering some advantage or potential advantage to the company and its general body of creditors. The payments were related "to the need to continue business, and to earn income or save loss during dependency of the petition". As Mahoney J. pointed out in Tellsa Furniture Pty. Ltd. (In Liq) v. Glendave Nominees Pty. Ltd. (supra) at 257, "it will, in general, see the continuation of the company's business as, in the proper case, for their benefit."

I do not regard the submission that the progress payments received by the company during this period enabled the company to make extensive void payments as being persuasive. The company was proceeding to carry on its business during this period. Many creditors of the company received payments. If all or any of the payments referred to are void payments, they can of course be pursued by the liquidator and ordered to be repaid into the fund unless the payees in question succeed in an application for their validation. If validated, the creditors involved received the benefit of the payments.

As to the submission that there was no demonstrated benefit to the company because it was not shown that the company's position had actually improved financially during the period since 13th April 1987, reliance was placed upon the evidence by Mr. Knight who had not been requested to do a detailed analysis of the financial position of the company after March 1987, and who had never been asked to express an opinion until he gave evidence in court. Of significance is his evidence at 127 of the transcript as follows:

> “Having regard to all the work you did and the figures that you prepared, are you able to form an opinion about whether or not the company benefited from trading between 13 April 1987 and 23 June 1987?-- There is no evidence that I have seen, or that I have tried to calculate, or that I have sought that would say it has benefited. On the other hand, I also have to say that the state of affairs or the reports to the affairs were prepared on a basis of the company being in default, being in liquidation, having ceased to trade. So it is a difficult comparison to make. I haven't seen any evidence one way or the other. You might say that the position has deteriorated, but the reports to affairs is prepared on a different basis, although, I think you can make the conclusion that because it has gone from - sorry, because the deficit has gone from $3,215,017 at the end of March to $7,785,941. At the day of winding up there was a further deterioration.
>
> Accepting that the company was insolvent in November was there any prospect of the figures you have seen improving

> its position?-- Well, the only figures that we have calculated in detail are to the end of March and we were using the reports to affairs to give us a look at the position beyond that time. It is possible that there may have been a marginal improvement in one month, but I can't say that for certain that it is or that it has not been the case.”

Mr. Knight's main difficulty was that the statement of affairs by the directors was prepared on the basis of the company being in default, being in liquidation, and having ceased to trade. Mr. Knight relied upon this statement of affairs insofar as it gave some picture as at the date of the winding-up. This made the comparison difficult if not impossible. Also it appears that the statement of affairs may not have been based upon accounting records of the company. But apart from that possibility, the endorsement at the bottom of ex. 26 highlights the difficulty in comparing the position over this period. On liquidation, a substantial lease liability was crystallised and current projects were determined.

Mr. Knight was previously asked about what the position would have been on 23rd June 1987, if the assets of the company had included the work in progress at the valuation of $2,432,000 referred to in ex. 25 rather than at the estimated realisable value of $25,000 (ex. 25, 26) shown as retentions. This reduced the deficiency at 23rd June 1987 from $10,192,941 to $7,785,941, hence his statement as to the further deterioration from the figure of $3,215,017 at 31st March 1987. This statement was not expressed with confidence.

However, of significance is the further fact that he was not asked to also explain the effect of the immediate crystallising of all future lease charges, which was caused by the winding-up and which resulted in an immediate and substantial lease liability, as the annotation to his document, ex. 26, demonstrates. Probably the immediate debt which then crystallised is in the sum of $4,897,756 (ex. 26). If this is so, and apart from the winding-up, the

deficiency at 23rd June 1987 should probably be further reduced from $7,785,941 to $2,888,185. This deficiency is less than the deficiency of $3,215,017 as at 31st March 1987 and, on the basis contended for on behalf of the liquidator, involves an improvement in fact, or at least some arrest in the decline which counsel for the liquidator submitted as having to be established by A.P.A. in order to succeed in obtaining a validation order. Mr. Starkey's general statement in para. 8(ii) of his affidavit filed 13th March 1988, that the financial position of the company did not improve between April 1987 and the date of the winding-up order, does not, in the light of his reliance on the statement of affairs (para. 8(i) of his affidavit), take the matter much further. He delegated the work to a Mr. Christy who did not give evidence and to Mr. Hellen, although he was not cross-examined on that statement in his affidavit. Mr. Starkey did not say that the financial position declined. Care must be taken also not to overlook the fact that assets disposed of after the winding-up order were disposed of on a liquidation basis.

But even if the evidence by Mr. Knight indicated that there was subsequently shown to be a further overall financial deterioration in the affairs of the company between 13th April 1987 and 23rd June 1987, (or perhaps to put it correctly that A.P.A. had not discharged the onus of showing an improvement), I do not see how a decline is determinative of the question of whether or not there was, at the time each of the payments were made, a potential and counter-veiling benefit to the company and to the creditors by the company continuing to carry on its business during that period and receiving large sums by way of progress payments which otherwise would not have been received.

I find that there was a counter-veiling benefit to the company and to the general body of creditors by the continuation of the company's business and by the receipt of substantial progress payments made possible largely as a result of continued provision of trucks by A.P.A. Even if it had been later shown that the overall financial position

of the company deteriorated in the relevant period, the rate of decline must have been substantially diminished by the injection of this large amount of funds. The company clearly earned income during the relevant period and in my view reduced ultimate losses to a considerable extent. This clearly is a benefit to the company and to the general body of creditors. The total sum of $41,602.13 paid to A.P.A. during this period represents from a commercial point of view, a relatively insignificant benefit to A.P.A. whilst at the same time producing a potentially substantial benefit to the company and to the creditors generally.

I should add that even if the question of whether the company's ultimate financial position or asset position actually improved or declined over the relevant period is the correct test on the question of benefit or potential benefit to the company and the creditors flowing from the two payments to A.P.A., any such change cannot be gauged simply by balancing total cash receipts during the period against total cash payouts during that period. During evidence by Mr. Hellen, counsel for the liquidator appeared to raise this as a factor, but thereafter did not appear to press this aspect. Vasta J in Re Allan Fitzgerald Pty. Ltd. (In Liq) (supra) at 506, when dealing with the question of whether the assets of the company were substantially increased during the relevant period, said that the contrary was indicated because sums which were paid out exceeded receipts. However, His Honour was simply dealing with the submission that the trial Judge had exercised his discretion upon conclusions which had not been supported by the evidence. Matthews J. in this respect agreed with the reasons given by Kelly A.C.J. (501). All members of the court then proceeded to exercise the discretion de novo, with Matthews J. at 501 and Vasta J. at 508 in effect holding that what was of critical importance was the fact that the payments were made outside the ordinary course of business and that the respondent could not be said to have acted with good faith. An ultimate change in the financial position of a company or a change in its assets, must depend on numerous factors such as the source and

disposition of the funds, and the movement of all assets and liabilities in general. It cannot be determined simply by a comparison of cash receipts versus cash payments. Mr. Knight in his ex. 26, did not purport to simply compare cash receipts with cash payments. Even though the second page of that documents refers to “cash deficiency”, it is clear from that page and also the first page of ex. 26 that Mr. Knight was attempting to determine the actual deficiency of total assets when compared with total liabilities for the period up to 31st March 1987. For the period up to 23rd June 1987, he relied on the statement of affairs.

The foregoing in no way detracts from the finding above, that the payments to A.P.A. directly enabled a continuation of the company's business and the injection of a considerable amount of funds which would otherwise have been lost, thus providing an actual or potential benefit to the company and to the creditors. Ultimate losses were reduced and creditors might have the prospect of receiving some dividend or perhaps a greater dividend than would otherwise have been the case.

Some of the authorities refer to the presence or absence of a belief in the creditor that at the time of the payments under attack, receipt by the debtor of progress payments or the continuation of its business was likely to enable the debtor to pay its outstanding debts. Some reference has also been made to the question of whether or not the creditor was motivated by the consideration that it was in the interests of the creditors for the company to continue working. Such considerations can be of considerable importance in a particular case. See for example Re Allan Fitzgerald Pty. Ltd. (In Liq) (supra) (Full Court), and particularly in the judgment of Vasta J. Such considerations would doubtless have been important as going to the question of good faith in a case where the creditor knew of the financial predicament of the debtor over a long period and was pressing for payment of long outstanding debts under various threats.

There is no direct evidence in this case that A.P.A. had any such belief or was motivated by the consideration referred to. However, any such belief or motivation is not relevant on the facts of this case. This is so simply because Mr. O'Donnell at no time prior to about the time of appointment of the provisional liquidator, knew or had any reason to suspect that the company was unable to pay its debts as they fell due, or that any payments to A.P.A. would be preferential. Unlike the situation confronting the Full Court in Re Allan Fitzgerald Pty. Ltd. (In Liq) (supra), Mr. O'Donnell had no knowledge of the actual financial affairs of the company or of its relationship with other creditors. A.P.A. merely continued to supply trucks over the period in question right to the very end in return for payments from time to time, as it had done throughout its previous dealings with the company.

I have not overlooked the evidence of hardship. In my opinion, A.P.A. has not established relevant hardship. In any event, as indicated above, this is not a relevant consideration.

For all of the above reasons, I am clearly of the view that there should be an order on A.P.A.'s application filed 13th April 1988 that each of these two payments should be validated.

INTEREST

The question is whether interest should be awarded and if so at what rate and for what period with respect to the preference of $38,837.59. The application was filed on 13th March 1988 by the liquidator which is now five years ago.

Counsel for the liquidator submitted that a rate of 12 per cent per annum was appropriate and that because A.P.A. has had use of the money since late 1986, interest should be awarded from the date of the demand on 2nd February 1988. It was submitted by counsel for A.P.A. that by reason of the long delay in the prosecution of the claim, interest

should not be awarded at all. He conceded that it was a matter for the discretion of the court.

There has been very lengthy delay in the prosecution of this particular application. Mr. Starkey said that there were many applications involving the company and that they had decided to proceed on some only. One matter involved an appeal to the Full Court (16th December 1988) and the refusal of special leave to the High Court on 12th May 1989. This accounts for only part of the delay.

Whilst the discretion is at large, some of the matters which it is appropriate to take into account are referred to in the judgment of Thomas J. (with whom Kneipp J. and Derrington J. agreed) in Serisier Investments Pty. Ltd. v. English [1989] 1 Qd.R. 678. His Honour said at 679:

> "There are sometimes circumstances in which it would be unfair to order a defendant to pay interest over the whole period. This includes the situation where the defendant is unaware of the existence of any claim or liability and would have ordered his affairs differently had he been advised of it, or where a defendant may have offered amends at an earlier date had the claim been made. A far more common case in which interest is not allowed from the date of the loss is where the plaintiff has been guilty of unreasonable delay in prosecuting the claim. The public policy of having claims brought and determined promptly seems to underlie this approach. Goff J. thought that 'this may be to encourage plaintiffs to prosecute their claims with diligence, and also because such conduct may lull a defendant into a false sense of security, leading him to think that the claim will not be pursued against him' (*B.P. Exploration (Libya)* Co. Ltd. v. Hunt (No. 2) at 847). These examples are however exceptions to the normal position that in order to remove the advantage that the wrongdoer has had from money that ought to have been in the pocket of the plaintiff interest is awarded from the date of loss."

The date of the "loss" as determined by subsequent events, appears to be the date of commencement of the winding-up on 13th April 1987: Re Mike Electric (Aust) Pty. Ltd. (In Liq) [1984] 71 F.L.R. 117, as applied by Ryan J.

in Re Toowong Trading Pty. Ltd. (in Liq) [1989] 1 Qd.R. 207, and again in Re Allan Fitzgerald Pty. Ltd. (In Liq) and National Westminster Finance Australia Limited on 29th September 1992. In Spedley Securities Ltd. (In Liq) v. Western United Ltd. (In Liq) (1991-2) 7 A.C.S.R. 721, interest was awarded from the date of the demand which is the date sought to be adopted by counsel for the liquidator in the present application. McLelland J. said that there could be no cause of action until a liquidator was appointed.

Some general explanation was given to explain the delay but none of those matters are in any way the fault of A.P.A. On the other hand, A.P.A. had notice of the claim since 2nd February 1988. There is no evidence of what might have occurred if anything between A.P.A. and the liquidators since that date. There is also the question of A.P.A.'s application filed 13th April 1988 (i.e. one month after the liquidator's application). It was not proceeded with and no explanations were advanced as to why it did not proceed earlier.

From the findings in this case, it cannot be said that the claim by the liquidator and the claim by A.P.A. were readily capable of resolution. I was informed throughout the hearing that some attempts had been made to settle the matter without success. There is no evidence as to delays in the progress of the liquidation since the winding-up order was made.

It seems to me that in the circumstances of the case, it would be fair to both parties if interest was awarded for a period of three years at 12 per cent. This gives a figure of $13,982 which should be included in the order.

ORDERS

1. On the application filed 13th March 1988 by the liquidator, there is a declaration that by reason of payments made by the company to A.P.A. during the period between 17th November 1986 and 13th April

1987, there is a preference in the sum of $38,837.59 and this sum is void as against the applicant/liquidator. I order that A.P.A. forthwith pay to the liquidator, the sum of $38,837.59 plus interest in the sum of $13,982, totalling $52,819.12. The application is otherwise dismissed.

2. On the application filed by A.P.A. on 13th April 1988, I order that payments by the company to A.P.A. of $12,124 on 15th April 1987 and of $29,478.13 on 21st May 1987 totalling $41,602.13 be validated.

I will now hear submissions as to costs.