**Insolvency Law and Practice**

**Webinars March 2023**

The outline for the webinar is as follows:

**1. High Court decisions, including:**

1. Preferential Payments; Bryant -v- Badenoch Integrated Logging P/L (2023) HCA 2
2. Preferential Payments; Metal Manufactures -v- Morton (2023) HCA 1
3. Resulting trust; how safe is the family home; Bosanac -v- Commissioner of Tax (2022) HCA 34

**2. Insolvency principles that were tested during 2022**

1. Creditor defeating transactions (Re Intellicomms Pty Ltd (in liq) [2022] VSC 228 (11 May 2022))
2. Pearce, in the matter of Bandiera Holdings Pty Ltd (Receiver Appointed) (in liquidation) v Bandiera Holdings Pty Ltd [2022] FCA 876
3. Aviation 3030 Pty Ltd (in liq) v Lao, in the matter of Aviation 3030 Pty Ltd (in liq) [2022] FCA 458
4. McMillan v Warner (Trustee) [2022] FCAFC 20.
5. Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited [2023] HCA 6 (8 March 2023)

**3. Developments and trends for Insolvency Practice**

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**1(a)**

**CORPORATIONS ACT 2001 - SECT 588FA**

**Unfair preferences**

(1) A transaction is an unfair preference given by a company to a creditor of the company if, and only if:

(a) the company and the creditor are parties to the transaction (even if someone else is also a party); and

(b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;

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

…

(3) Where:

(a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including such a relationship to which other persons are parties); and

(b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;

then:

(c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and

(d) the transaction referred to in paragraph (a) may only be taken to be an unfair preference given by the company to the creditor if, because of subsection (1) as applying because of paragraph (c) of this subsection, the single transaction referred to in the last-mentioned paragraph is taken to be such an unfair preference.

**CORPORATIONS ACT 2001 - SECT 588FG**

**Transaction not voidable as against certain persons**

If no benefit or benefit received in good faith without grounds for suspecting insolvency

(1) A court is not to make under section 588FF an order materially prejudicing a right or interest of a person other than a party to the transaction if it is proved that:

(a) the person received no benefit because of the transaction; or

(b) in relation to each benefit that the person received because of the transaction:

(i) the person received the benefit in good faith; and

(ii) at the time when the person received the benefit:

(A) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and

(B) a reasonable person in the person's circumstances would have had no such grounds for so suspecting.

**Bryant -v- Badenoch Integrated Logging P/L (2023) HCA 2(8 February 2023)**

1. KIEFEL CJ. I agree with Jagot J.
2. GAGELER J. I agree with Jagot J.
3. GORDON J. I agree with Jagot J.
4. EDELMAN J. I agree with Jagot J.
5. STEWARD J. I agree with Jagot J.
6. GLEESON J. I agree with Jagot J.
7. JAGOT J.
8. The first question is one of statutory construction. The question is whether the so-called "peak indebtedness rule" is part of or is excluded by [s 588FA(3)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fa.html) of the [*Corporations Act*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/).The "peak indebtedness rule" permits a liquidator to choose the starting date within the relevantly prescribed statutory period (in this case, the relation-back period of six months prescribed by [s 588FE(2))](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fe.html) to prove the existence of an unfair preference given by the company to a creditor**[[3]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn3)**.
9. The second question is one of characterisation. What is the proper approach to determining whether a "transaction is, for commercial purposes, an integral part of a continuing business relationship" as referred to in [s 588FA(3)(a)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fa.html) of the [*Corporations Act*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/)?
10. The third question is one of evaluation of facts. Were certain payments in this case from the debtor (identified below as "Gunns") to the creditor (identified below as "Badenoch"), for commercial purposes, an integral part of a "continuing business relationship" between them within the meaning of [s 588FA(3)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fa.html) of the [*Corporations Act*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/)? There is also a subsidiary question about the date on which the "continuing business relationship" between Gunns and Badenoch ended.

**Summary of conclusions**

1. First, [Pt 5.7B](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/index.html#p5.7b) of the [*Corporations Act*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/) does not incorporate the "peak indebtedness rule". Rather, the first transaction that can form part of the continuing business relationship contemplated by [s 588FA(3)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fa.html) is either the first transaction after the beginning of the prescribed period or after the date of insolvency, or (if the relationship started after the beginning of the prescribed period or the date of insolvency) the first transaction after the beginning of the continuing business relationship, whichever is the later.
2. Second, answering the statutory question under [s 588FA(3)(a)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fa.html) whether a "transaction is, for commercial purposes, an integral part of a continuing business relationship" involves an objective factual inquiry. What one or both of the parties to the transaction intended (if ascertainable) may be relevant to, but is not determinative of, the statutory question. The task is one of characterisation of the facts, involving an objective ascertainment of the "business character"**[[4]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn4)** of the relevant transaction. It is therefore necessary to consider the whole of the evidence of the "actual business" relationship between the parties**[[5]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn5)**.
3. Third, the Full Court did not err in concluding that certain payments were transactions forming an integral part of the continuing business relationship between Gunns and Badenoch (defined in these reasons below as payments 1 and 2)**[[6]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn6)**. Nor did it err in concluding that other (later) payments were not transactions forming part of the continuing business relationship between Gunns and Badenoch (defined in these reasons below as payments 5 to 11)**[[7]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn7)**. It also did not err in concluding that the continuing business relationship did not cease until 10 July 2012 and that, applying [s 588FA(1)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fa.html) to the deemed single transaction created by [s 588FA(3)(c)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fa.html) and as required by [s 588FA(3)(d)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fa.html), there could be no unfair preference given by Gunns to Badenoch**[[8]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn8)**.
4. Gunns and Badenoch entered into an agreement in 2003 for Badenoch to supply Gunns with timber. Under the agreement, Badenoch provided timber in a specified quantity per annum. Badenoch was to provide an invoice at the end of each calendar month and payment was due from Gunns on the last working day of the following month. They renewed their agreement in 2008 for the period from 1 January 2008 to June 2013.
5. Gunns suffered significant declines in revenue from 2010. By late 2011, Gunns' parlous financial position was the subject of significant media coverage. On 9 March 2012, Gunns announced a halt in trading of its shares pending the release of an announcement to the market. Despite repeated efforts, Gunns was unable to raise sufficient further capital as required.
6. Badenoch continued to provide services to Gunns during this time, despite Gunns frequently being late in making payments or only making partial payments. Badenoch took steps to protect its position from Gunns' increasing indebtedness and uncertain financial position in various ways, including threatening to cease supply and ceasing supply for short periods, issuing letters of demand, negotiating a payment plan, and seeking a bank guarantee. Ultimately, in August 2012, Badenoch agreed with Gunns to terminate the agreement on the basis that it would continue to supply some services for a further short period to enable "another contractor [to get] up to speed"**[[11]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn11)**.
7. On 25 September 2012, and while Badenoch was continuing to supply some services to Gunns, Gunns appointed the liquidators as joint and several administrators.

Bryant, in the matter of Gunns Limited (in liq) (receivers and managers appointed) v Badenoch Integrated Logging Pty Ltd [2020] FCA 713 (27 May 2020)

111. There are four limbs (of the Defence) that must be satisfied by Badenoch:

first, that it became a party to the transactions in good faith: s 588FG(2)(a);

secondly, that it had no reasonable grounds for suspecting that the company was insolvent at the relevant time, or would become insolvent: s 588FG(2)(b)(i);

thirdly, that a reasonable person in Badenoch’s circumstances would have had no such grounds for suspecting insolvency: s 588FG(2)(b)(ii); and

fourthly, that Badenoch provided valuable consideration under the transactions or changed its position in reliance on the transactions.

112. In the present case, … Since the dealings between Gunns and Badenoch in the period April 2012 to 30 June 2012 (inclusive) are to be treated as a “single transaction” pursuant to s 588FA(3), good faith must be established during that entire period.

117. The evidence showed that by at least March 2012, Gunns had been late in paying Badenoch’s invoices for about 18 months, and Badenoch regularly had to chase up payment. Badenoch also … (list of 12 facts)

118. These facts and matters of which Badenoch was aware as at the end of March 2012 provided reasonable grounds for Badenoch to suspect that Gunns was insolvent or would become insolvent, despite the representations from (Gunns employees) that Gunns was solvent and its cash flow problems were only temporary.

Bryant -v- Badenoch Integrated Logging P/L (2023) HCA 2(8 February 2023)

36. After a separate, contested hearing, the primary judge (Davies J) determined the insolvency date of Gunns to be 30 March 2012**[[15]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn15)**. The liquidators therefore contended that all payments made by Gunns to Badenoch during the period from 30 March to 25 September 2012 were voidable transactions**[[16]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn16)**.

* 1. The context of the statutory provisions discloses that it cannot be assumed or inferred that, in incorporating the "running account principle" in [s 588FA(3)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fa.html) of the [*Corporations Act*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/), the legislature also intended to incorporate the "peak indebtedness rule".

64. "[A] continuing business relationship" in s 588FA(3)(a) may start either before or during the prescribed period. "

1. The power of a court under s 588FF(1) of the [*Corporations Act*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/num_act/ca1989172/) to make orders if it is satisfied that a transaction of a company is voidable is engaged "on the application of a company's liquidator". This reflects the liquidator's functions and powers under [ss 477](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/num_act/ca1989172/s477.html) and [478](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/num_act/ca1989172/s478.html) of the [*Corporations Act*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/num_act/ca1989172/). It also reflects that it is for the liquidator (at least in the first instance) to decide what the liquidator's statutory and fiduciary duties to the company require in the circumstances**[[55]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn55)**. This underlies the fact that a court's power under s 588FF is conditioned on an application by a liquidator and, in this sense, depends on a choice or election of a liquidator to impugn the transaction**[[56]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn56)**.

Authority that interest accrues from the date of the liquidator’s demand (Capital Finance Australia Limited v Tolcher, [2007] FCAFC 185 at [144].

74. It follows from the same reasoning as set out above concerning the purpose of s 588FA (to identify voidable transactions) that "all the transactions forming part of the relationship" for the purpose of the deemed "single transaction" in s 588FA(3)(c) must mean "the relationship" starting at the beginning of the prescribed period, or the date of insolvency, or (if the relationship started after the beginning of the prescribed period or the date of insolvency) the beginning of the continuing business relationship, whichever is the later. These objective facts determine the operation of the provisions, not the choice made by a liquidator in the application under s 588FF.

77. Once it is accepted that the first transaction in the continuing business relationship cannot be the first transaction between the creditor and debtorif that occurred before the prescribed period, but must be a later transaction, then (leaving aside a case in which the continuing business relationship itself starts during the prescribed period and after the date of insolvency) there was (and is) a policy choice available between two starting points. Barwick CJ recognised that this was the choice in *Rees v Bank of New South Wales* and saw no reason why the choice should not be that of the liquidator**[[63]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn63)**. The first choice, selecting the time of peak indebtedness within the prescribed period when a transaction may be voidable, maximises the potential for there to be an unfair preference and the amount of any unfair preference. The second choice, by not selecting the time of peak indebtedness, permits the facts as they exist to dictate if there is an unfair preference and the amount of any unfair preference.

78. the date of the first transaction in the relevant relationship between Gunns and Badenoch in accordance with s 588FA(3) of the [*Corporations Act*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/num_act/ca1989172/) is 30 March 2012, being the later of the date of the start of the prescribed period under s 588FE(2)(b) (26 March 2012, the relation-back day being 25 September 2012 when the liquidators were appointed as administrators of Gunns) and the date of insolvency (30 March 2012), the continuing business relationship having started years before the prescribed period.

81. The concept of the "mutual assumption" or common business "purpose" of the parties in relation to the transaction may be useful, but only to the extent that it serves as a description of the objective ascertainment of the "business character" of the transaction which is required to answer the statutory question. To parse the terms "mutual assumption" or common business "purpose", searching for their metes and bounds as if they were the language of a statute, is impermissibly to divert attention from that statutory question. What one or both of the parties intended (if ascertainable) may be relevant to, but is not determinative of, the statutory question.

1. It follows that it is not the case that a continuing business relationship necessarily continues unless and until it can be inferred that the *sole* mutual assumption or purpose of the creditor and debtor in respect of the transaction is the reduction of indebtedness. That is not what was being said in *Airservices Australia v Ferrier***[[76]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn76)**. The statutory task remains one of characterisation of the facts involving an objective ascertainment, on the whole of the evidence, of the business character (for commercial purposes) of the transaction in issue.
2. The actual business relationship, evaluated in its commercial context, is critical. In the present case, Gunns had often made only partial payments of Badenoch's invoices since 2010, but the agreement and the business relationship continued. The controlling minds of Badenoch believed that Gunns would ultimately be in a position to pay all of Badenoch's outstanding invoices**[[86]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn86)**. The temporary cessation of supply and negotiation of additional credit terms in March 2012 did not cause Gunns or Badenoch to consider that their business relationship was coming to an end. To the contrary, they were working towards their business relationship continuing and believed it would do so (and, indeed, it did do so)**[[87]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn87)**. The mere change in credit terms between Gunns and Badenoch in March 2012 did not operate to bring their continuing business relationship to an end. Nor is the fact that Badenoch and Gunns *also* wanted to reduce Gunns' past indebtedness determinative[**[88]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html#fn88).

91The mutual assumption or purpose as between Gunns and Badenoch that should be inferred as a matter of objective fact from all of the circumstances in the present case is that payments 1 and 2 were made to induce further supply. Their mutual intention that the payments would also reduce Gunns' past indebtedness, in the context of the actual business relationship as a whole, was not such as to characterise the payments as having been made to reduce past indebtedness, *rather than*[**[89]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html#fn89) to induce the continuation of supply. To conclude otherwise would be to "ignore the practical relationship between the payments and the subsequent supply of services and the ultimate effect of the dealings between the parties

93. *Payments 5 to 11*

1. Payments 5 to 11 were made between 6 (or 8) August and 21 (or 24) September 2012**[[92]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn92)**. By early July 2012 Badenoch had again decided to cease supplying Gunns due to its inability to obtain payment**[[93]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn93)**. Badenoch's lawyers wrote to Gunns on 3 July 2012 demanding payment, threatening to commence legal proceedings to recover a debt of $737,633.68, and saying that once Badenoch had "finalised those services which have been agreed to between it and your Regional Management", Badenoch would cease to provide any further services to Gunns until non-payment was rectified**[[94]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn94)**. On 10 July 2012, Badenoch ceased to provide services to Gunns**[[95]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn95)**. On 11 July 2012, Gunns proposed a payment plan in response to the letter from Badenoch's lawyers. On 31 July 2012, Badenoch wrote to Gunns saying that Badenoch was owed $1.36 million and the non-payment was a breach of a fundamental term of the contract, amounting to a repudiation of the agreement. The letter continued**[[96]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn96)**:

"Before we accept Auspines [sic] repudiation, we propose to investigate the opportunity for a transition to a mutually acceptable termination of the agreement at the end of three or four months.

We understand that you would regard it as helpful if we were to supply logs. Subject to the following arrangements, we are willing to meet this need in the short term with a gradual tapering off while another contractor gets up to speed."

*[The Latin adverb sic; "thus", "just as"; in full: “sic erat scriptum” ("thus was it written") inserted after a quoted word or passage indicates that the quoted matter has been transcribed or translated exactly as found in the source text, complete with any erroneous, archaic, or otherwise nonstandard spelling, punctuation, or grammar.]*

* 1. On 31 July 2012, Badenoch rendered an invoice in the sum of $194,273.06**[[110]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn110)**. This is after the date on which the primary judge had found the continuing business relationship ceased**[[111]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn111)**. In its second judgment the Full Court concluded that the continuing business relationship ceased on 10 July 2012, being the date on which Badenoch ceased supply for the second time**[[112]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn112)**. While the invoice of 31 July 2012 was rendered after this date, it related to supply by Badenoch before this date. The Full Court, accordingly, concluded that the 31 July 2012 invoice was a transaction forming part of the continuing business relationship**[[113]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn113)**.
	2. These submissions are disconnected from the actual business relationship between Gunns and Badenoch, at least by 2 August 2012. By that time, in a practical "business sense"**[[102]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn102)**, the pre‑existing business relationship between Gunns and Badenoch had ceased. They had agreed that their agreement would cease and also agreed a transition plan towards the cessation of supply. Badenoch was intent on supplying for the purpose of maximising the reduction of Gunns' debt to it before the handover to another contractor**[[103]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn103)**. Gunns knew from Badenoch's letter of 31 July 2012 it would need to find another contractor**[[104]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/2.html%22%20%5Cl%20%22fn104)**. As a result, the fact that some supply continued after the 2 August 2012 agreement is immaterial. That supply was not provided pursuant to the pre-existing business relationship. It was provided pursuant to the agreed transition plan to another contractor. The continuing business relationship between Gunns and Badenoch had ceased by no later than 2 August 2012, before payment 5 was made.

Examples; normal trade supplier, ATO

1(b) Metal Manufactures -v- Morton (2023) HCA 1(8 February 2023)

**Decision**

**A** creditor which was in receipt of a preferential payment cannot set-off pre-liquidation debts owing to that creditor against a liquidator’s voidable transaction claims.

The High Court unanimously agreed with the decision of the Full Court of the Federal Court that a set-off was not available in respect of an unfair preference claim.

KIEFEL CJ, GORDON, EDELMAN AND STEWARD JJ.

* 1. Given that the separate debt (viz. balance still owing to the creditor) exceeds the amount of the alleged unfair preferences, if the appellant could set off that debt under [s 553C(1)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s553c.html), the first respondent would not obtain an order for payment under [s 588FF(1)(a).](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588ff.html)Accordingly**,**by an Amended Special Case, Derrington J reserved for consideration by the Full Court of the Federal Court the following question:

"Is statutory set-off, under [s 553C(1)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s553c.html) of the [*Corporations Act 2001*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/) (Cth) ("Act"), available to the [appellant] in this proceeding against the [first respondent's] claim as liquidator for the recovery of an unfair preference under [s 588FA](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fa.html) of the [Act](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/)?"

1. In a comprehensive set of reasons, the Full Court said that the question posed should be answered "No"**[[1]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn1)**.

6. …The company, whilst being wound up, does not hold its property on trust for creditors and members. The statutory regime for the administration of a company in liquidation is both an exhaustive and sufficient measure for the distribution of the company's property which does not necessitate or justify the intervention of equity.

1. although the appointment of the liquidator circumscribed or suspended the exercise of the incidents of ownership of assets by the usual organs of the company, that did not mean that the company held its assets on trust**[[19]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn19)**.
2. Nor does the liquidator hold any of the property that he or she gathers in and controls on trust for the creditors and members of the company**[[20]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn20)***.*
3. It follows from acceptance of the proposition that the company remains the beneficial owner of all the property gathered in and controlled by the liquidator that it also is the beneficial owner of all payments received by it during the course of the winding up. This includes payments made to the company by order of a court pursuant to [s 588FF(1)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588ff.html) of the [Act](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/). That is not to deny, however, that the property of the company and any payments or transfers of property made to the company during the process of winding up are subject to the "statutory scheme of liquidation".
4. In that respect, it has been recognised that creditors of a company in liquidation enjoy a "special interest" – namely to have the assets of the company gathered together and then distributed**[[21]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn21)**.
5. [Section 553C](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s553c.html) of the [Act](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/) confers the right of set-off relied upon by the appellant. It should be set out in full:

"**Insolvent companies – mutual credit and set-off**

(1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:

(a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and

(b) the sum due from the one party is to be set off against any sum due from the other party; and

(c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.

(2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent."

1. It might be thought that [s 553C](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s553c.html) offends the *pari passu* principle because it gives the creditor a complete discharge of what it is owed, dollar for dollar. Such an observation is mistaken. The purpose of [s 553C](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s553c.html) is to ascertain what is available for distribution on a *pari passu* basis. It is only the balance of any set-off (when it favours the creditor) which is then admissible to proof against the company for the purposes of [s 553.](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s553.html) Before then, the law permits a set-off of mutually incurred credits, debts or dealings because that is a just outcome chosen by Parliament.
	1. First, s 553C has a temporal element. As has been explained, s 553 circumscribes the pool of claims which are provable in a winding up to those debts payable by and claims against the company "the circumstances giving rise to which occurred *before the [winding up]*" (emphasis added). The operation of s 553 informs the availability of set-off because after set-off under s 553C(1)(c) the balance of an account is admissible to proof – being proof admissible against the company under s 553. Accordingly, for the purposes of assessing whether there is mutuality, the rights of the parties are to be taken and ascertained as at the time of winding up**[[33]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn33)**; the important factor is whether there is an obligation or liability *prior to liquidation* which might mature into a debt owing**[[34]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn34)**. Thus, any acquisition by a liquidator of new claims on behalf of a company cannot vary the parties' antecedent rights such as to be available for set-off**[[35]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn35)**.

24. Contrary to the contention of the appellant, (the respondent) submitted that the cause of action conferred by [s 588FF](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588ff.html) was not one exercisable by the liquidator as agent of the company**[[41]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn41)**, but rather as an officer of the court. That submission should be accepted. When deciding to institute proceedings pursuant to [s 588FF](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588ff.html), the liquidator acts as an officer of the court charged with the duties and responsibilities created by the statutory scheme of liquidation. It follows that whilst the liquidator might in other situations be characterised as an agent of the company, for the purposes of [s 588FF](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588ff.html) no reason exists to characterise the liquidator as acting in such a capacity.

30. Five features of the foregoing statutory scheme of liquidation should be emphasised.

1. First, the liquidator is given power and responsibility to identify and gather in the assets of the company for distribution to creditors and contributories. Secondly, the liquidator is also obliged to distribute those assets by the making of priority payments and then on a *pari passu* basis by paying creditors and contributories. Thirdly, a bright line is drawn to enable the liquidator to determine what debts are payable by the company and what claims must be met against it; here it is those arising from "circumstances" which existed "before" the date of winding up. Fourthly, in aid of the duty to gather in the assets of the company, the liquidator may recover preference payments as a debt owed to the company. Finally, in determining what debts are payable and what claims must be met, a set-off must take place between what is due as between the company and another person arising from "mutual credits, mutual debts or other mutual dealings".
2. To the extent that the cases of*Re Parker***[[78]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn78)***, Buzzle Operations Pty Ltd (In liq) v Apple Computer Australia Pty Ltd***[[79]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn79)**,*Shirlaw v Lewis***[[80]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn80)**, *Hall v Poolman***[[81]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn81)** and *Stone v Melrose Cranes & Rigging Pty Ltd [No 2]***[[82]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn82)** are inconsistent with the above analysis, they should now be considered to be wrongly decided.

GAGELER J.

1. In the Full Court**[[88]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn88)**, Allsop CJ illustrated that consequence through a simple hypothetical example. The example assumes a creditor who has two debts each of $100 and who is unfairly preferred as to one in full. If the creditor is obliged by an order under [s 588FF(1)(a)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588ff.html) of the [Act](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/) to repay the amount of the preferred debt in full, the property of the company available for distribution amongst all creditors is increased by $100. Upon repayment, the creditor can prove in the distribution for $200 as if the unfair preference had not occurred**[[89]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn89)**. If, however, [s 553C](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s553c.html) of the [Act](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/) entitles the creditor to set off the amount ordered to be repaid under [s 588FF(1)(a)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588ff.html), the creditor automatically receives the functional equivalent of 50 cents in the dollar. Given that [s 553C](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s553c.html) is self-executing**[[90]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/1.html%22%20%5Cl%20%22fn90)**, that occurs without the creditor needing to prove in the liquidation at all.

CORPORATIONS REGULATIONS 2001 - REG 5.5.04

Transactions that are not voidable

(1) This regulation is made for the purposes of paragraph 500AE(3)(b) of the Act.

(2) An unfair preference of a company is not voidable despite subsection 588FE(2) of the Act, provided either subregulation (3) or (4) is satisfied.

(3) This subregulation is satisfied if:

(a) the company is subject to the simplified liquidation process; and

(b) the transaction was entered into, or an act was done for the purposes of giving effect to it, before the day that is 3 months before the relation-back day; and

(c) no creditor under the transaction is a related entity of the company.

(4) This subregulation is satisfied if:

(a) the company is subject to the simplified liquidation process; and

(b) the transaction was entered into, or an act was done for the purposes of giving effect to it:

(i) during the 3 months ending on the relation-back day; or

(ii) after that day but on or before the day when the winding up began; and

(c) either:

(i) the transaction results in the creditor receiving from the company no more than $30,000 in value; or

(ii) if the transaction forms part of a series of related transactions, all of the related transactions result in the creditor receiving from the company no more than $30,000 in value; and

(d) no creditor under the transaction is a related entity of the company.

# 1(c) Bosanac v Commissioner of Taxation [2022] HCA 34 (12 October 2022)

1. KIEFEL CJ AND GLEESON J. This appeal concerns the purchase by Ms Bosanac of a residential property in Perth ("the Dalkeith property") in 2006. She and Mr Bosanac married in 1998. They separated in 2012 or 2013 but continued to reside together at the Dalkeith property until September 2015, when Mr Bosanac moved to a new residential address.
2. Ms Bosanac appears to have instigated the purchase of the Dalkeith property. In April 2006 she offered to purchase it for $4,500,000 subject to her obtaining approval for a loan of $3,000,000 from a bank. The offer was accepted in May 2006. The contract for sale required Ms Bosanac to pay a deposit of $250,000 within 30 days. The deposit was provided from an existing joint loan account in the names of Ms and Mr Bosanac.
3. In October 2006, Ms and Mr Bosanac applied for two loans in the sums of $1,000,000 and $3,500,000. The balance of the purchase price was paid from two loan accounts in their joint names, and after settlement the surplus funds in these accounts were paid into the joint loan account from which the deposit had been drawn. The Dalkeith property was registered in Ms Bosanac's name alone. Mr Bosanac has never claimed an interest in the property.
4. The Commissioner is a creditor of Mr Bosanac. The primary judge noted that there was no suggestion that the Dalkeith property was registered in Ms Bosanac's name alone with a view to Mr Bosanac avoiding his commitments to his creditors. The Commissioner brought proceedings seeking a declaration of a resulting trust over the equity in one‑half of the Dalkeith property, which is to say that Ms Bosanac held that interest in the property on trust for Mr Bosanac.

**BANKRUPTCY ACT 1966 - SECT 121 Transfers to defeat creditors**

(1) A transfer of property by a person who later becomes a bankrupt (the transferor ) to another person (the transferee ) is void against the trustee in the transferor's bankruptcy if:

(a) the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and

(b) the transferor's main purpose in making the transfer was:

(i) to prevent the transferred property from becoming divisible among the transferor's creditors; or

(ii) to hinder or delay the process of making property available for division among the transferor's creditors.

**BANKRUPTCY ACT 1966 - SECT 120 Undervalued transactions**

(1) A transfer of property by a person who later becomes a bankrupt (the transferor ) to another person (the transferee ) is void against the trustee in the transferor's bankruptcy if:

(a) the transfer took place in the period beginning 5 years before the commencement of the bankruptcy and ending on the date of the bankruptcy; and

(b) the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property.

1. The Commissioner sought to take advantage of the law's presumption, known as a presumption of resulting trust, that a person who advances purchase monies for property, which is held in the name of another person, intends to have a beneficial interest in the property[**[2]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html#fn2). That presumption is subject to an exception that, in the case of purchases by a husband in the name of a wife, or a parent (or person who stands *in* *loco parentis*) in the name of a child, there is a presumption of advancement (gift) or, in other words, a presumption that the purchaser intended that the beneficial interest would pass with the legal interest[**[3]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html#fn3). The Commissioner contended that the presumption of advancement of a wife by her husband, which operates to preclude a resulting trust from arising, is no longer part of the law of Australia in relation to the matrimonial home following the decision of this Court in *Trustees of the Property of Cummins v Cummins*[**[4]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html#fn4).

14. The presumption of advancement allows an inference as to intention to be drawn from the fact of certain relationships. It applies to transfers of property from husband to wife and father to child, but in *Nelson v Nelson*[**[20]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html#fn20) this Court accepted that there is no longer any basis for maintaining a distinction between a father and mother so far as concerns transfers of property to a child

15. On one view, the presumption of advancement is not strictly a presumption at all. It may be better understood as providing "the absence of any reason for assuming that a trust arose"**[[22]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html%22%20%5Cl%20%22fn22)**

21. It is the concern of the courts to determine what was intended when property was purchased or transferred. It may once have been the case that evidence capable of rebutting the presumptions was not available. That is unlikely to be so today, especially in the context of dealings as between spouses where the relationship has been of sufficient length to permit a court to observe how the spouses have dealt with property as between themselves and managed their affairs. This evidence may take many forms, but it has always been understood that the strength of the presumptions will vary from case to case depending on the evidence.

1. Moreover, the Commissioner's contention does not have regard to the facts in *Cummins* and the issues with which the Court was dealing. *Cummins* concerned property which included the matrimonial home of Mr and Mrs Cummins. The title to it had originally been taken in their joint names. The importance of that fact is evident from the opening words of the paragraph which follows that relied upon by the Commissioner[**[41]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html#fn41):

"That reasoning applies with added force in the present case where the title was taken in the joint names of the spouses."

1. The husband then transferred his legal and beneficial interest in the matrimonial home to his wife with the intention of placing it beyond the reach of his creditors, contrary to [s 121(1)(b)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/s121.html) of the [*Bankruptcy Act 1966*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ba1966142/)

32. The question of intention is entirely one of fact, and concerns the intention manifested by the person or persons who contributed funds towards the purchase of the property. In *Martin v Martin***[[47]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html%22%20%5Cl%20%22fn47)**, it was observed that for the most part it can be assumed that proof of intention will be made out by the circumstances.

33. Cussen J went on to say that evidence of that person's thinking at the time might be accepted, although it would be received "with caution".

35. There was a history of Ms and Mr Bosanac holding their substantial real and other property in their own names. Consistently with this, it was evidently the desire of Ms Bosanac to purchase the Dalkeith property and have it registered in her name alone.

* 1. The Dalkeith property was never registered in Mr Bosanac's name. There was no transfer of the property from Mr Bosanac to Ms Bosanac. He did not advance all the monies for the purchase of the Dalkeith property. Ms and Mr Bosanac were both parties to the loan agreements and both were liable to repay the loans. This may be thought to raise a question as to whether they intended that the property be held jointly. This explains the Commissioner's claim for a one‑half interest in the property.

41. There was further evidence before the primary judge of a subsequent dealing with the loan accounts over the Dalkeith property, or rather loan accounts which resulted from refinancing. The new loans continued to be secured by that property together with property owned individually. A portion of the loans was used by Mr Bosanac for his share trading. Ms Bosanac permitted this course. … The history of the spouses' dealings with property might suggest a use of property to secure joint loans which might benefit either or both of them, but it does not support an inference that either intended that property be held jointly. As the primary judge found, the "considerable evidence" was of separate ownership of property[**[55]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html#fn55).

1. The finding by the primary judge that Mr Bosanac was a sophisticated businessman who must have appreciated the significance of property being held in Ms Bosanac's name is not unimportant. His Honour was correct to conclude that that understanding did not support an inference that Mr Bosanac intended to have a beneficial interest in the Dalkeith property.

GAGELER J

1. The presumption on which the Commissioner based that claim is an ancient presumption of equity. The presumption arises where property was purchased by one or more persons using funds contributed in whole or in part by one or more others**[[61]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html%22%20%5Cl%20%22fn61)**. Unless there was consideration for the contribution, the presumption is that everyone concerned in the purchase transaction intended the property to be held at and from the time of purchase for the benefit of the contributors as tenants in common in proportion to their respective contributions. The presumed trust is sometimes referred to as a "purchase money resulting trust"**[[62]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html%22%20%5Cl%20%22fn62)**.

60. Unless and until they are together reappraised as an exercise in law reform and abolished or modified by legislation, the presumption of a resulting trust and the counter-presumption of advancement are here to stay.

64. The presumption of a resulting trust is a presumption of fact, functionally akin to a civil onus of proof. The presumption will yield to an actual intention to the contrary found on the balance of probabilities as an inference drawn from the totality of the evidence.

73. Second, "it can safely be said this does not appear to be an instance of a husband and wife sharing all of the matrimonial assets jointly".

74. Third, there was "considerable evidence" of "the use of separately owned properties as security for joint loans"[90].

75. That pattern of individual property ownership and joint borrowing leaves me unable to share the Full Court's view of it being "less probable than not ... that Mr Bosanac would take on a very substantial liability in respect of the Dalkeith Property without at the same time acquiring a corresponding beneficial interest in the Property"[91]. It also leaves me unable to agree with the Full Court's view that some significance should be attached to the fact that Mr Bosanac subsequently secured further borrowing against the Dalkeith property for the purposes of conducting his share trading[92].

76. Finally, and most importantly, there are the circumstances of the particular purchase transaction. To concentrate on the actions and inferred intention of Mr Bosanac, as did the Full Court, is to downplay the actions and inferred intention of Ms Bosanac. This is not a case in which it could be said that property was "purchased by" one person "in the name of" another[**[93]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html#fn93).

1. Ms Bosanac was the sole contracting party for the purchase of the Dalkeith property: she made the offer which was accepted by the vendor[**[94]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html#fn94). To complete the purchase, Ms Bosanac chose to expose herself to liability for repayment of the loans which she and Mr Bosanac took out and to the risk of default on those loans

GORDON AND EDELMAN JJ.

1. Delivering the judgment of the Supreme Court of Canada in *Kerr v Baranow***[[98]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html%22%20%5Cl%20%22fn98)**, Cromwell J observed that "there is not much one can say about resulting trusts without a well-grounded fear of contradiction. There is debate about how they should be classified and how they arise, let alone about many of the finer points". One source of difficulty is the description of the trust as "resulting". As Birks observed, "[i]f the traditional classification of trusts simply contradistinguished express and constructive trusts, there would be no further complications"**[[99]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html%22%20%5Cl%20%22fn99)**.

95. The "presumption of resulting trust" is a presumption that a resulting trust arises in the two circumstances where resulting trusts arise by objective intention. The presumption has been described as anachronistic**[[106]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html%22%20%5Cl%20%22fn106)**. As explained below, that description is correct.

[anachronistic: belonging or appropriate to an earlier period, especially so as to seem conspicuously old-fashioned]

1. As a resulting trust is an *inference* *drawn* in the *absence of evidence*, it is necessary to start with the objective facts. It is a factual inquiry. The question may be framed in these terms: what were the parties' words or conduct at the time of the transaction or so immediately thereafter as to constitute part of the transaction – the objective facts**[[142]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html%22%20%5Cl%20%22fn142)**?
2. There are three dimensions to that factual inquiry.
3. Where the objective facts based on evidence led by the plaintiff tend to establish an objective intention that a provider of part of the purchase price would hold an equitable interest as to a particular proportion of a particular property, there will be an express trust which satisfies the three certainties of intention, subject and object**[[143]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html%22%20%5Cl%20%22fn143)**. That is the case that the defendant has to meet. There is no need for a presumption of resulting trust to shift the onus of proof. The presumption of resulting trust does not arise. It is unnecessary.
4. On the other hand, where the objective facts based on evidence led by the plaintiff tend to establish, even weakly**[[144]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html%22%20%5Cl%20%22fn144)**, an objective intention inconsistent with a declaration of trust, then there will be no case for the defendant to meet. Again, the presumption of resulting trust will not arise**[[145]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html%22%20%5Cl%20%22fn145)**. In this circumstance, the fact that there is a spousal relationship is one of the objective facts: at best it merely reinforces, and is not determinative of, the objective intention of the parties established by the objective facts.
5. Where, however, the objective facts based on evidence led by the plaintiff are neutral, truly equivocal, non‑existent or uninformative as to the objective intention of the parties, then, consistent with the *weak* presumption of resulting trust, an inference can be drawn of a declaration of trust by the provider of part of the purchase price**[[146]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html%22%20%5Cl%20%22fn146)**. That weak inference will be the case that the defendant has to meet.
6. Third, the passages in *Cummins*were obiter; the objective facts in that case established that the intention of both parties was that they would hold the property jointly**[[164]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2022/34.html%22%20%5Cl%20%22fn164)**.

126 As has been observed, the Full Court reached the opposite conclusion. In short, it asked itself the wrong question. It did not start with the facts and ask – what were the parties' words or conduct at the time of the transaction or so immediately thereafter as to constitute part of the transaction.

**Some Commentary**

1. Many couples may own assets in a variety of ways such as having real estate owned personally, jointly, or in a family company or family trust. Invariably, no, or little consideration is given to what is the best way to own or hold legal title to that asset.
2. If one spouse is exposed to legal or financial risk, some couples will decide to register the legal ownership of valuable assets, eg, the family home, in the other spouse’s name who is not at risk. However, this, by itself, may not protect the asset.
3. Note that the presumption of advancement applies in respect of an advancement or transfer of property from a husband to a wife but not in respect of a transfer from a wife to a husband; nor does it apply in respect to de facto or same sex couples.
4. … presumptions cease to be of practical significance where evidence supports the intention of who was intended to be the true owner of the property.
5. Thus, the presumptions may still have a role to play where there is insufficient evidence to decide who the true owner is.

**2. Insolvency principles that were tested during 2022**

**Re Intellicomms Pty Ltd (in liq) [2022] VSC 228 (11 May 2022) (Creditor defeating transactions)**

The Facts

Intellicomms operated a business which provided translation services. On 8 September 2021, Intellicomms sold its business assets to Tecnologie Fluenti Pty Ltd. Later that day, its sole director, Ms Haynes, placed Intellicomms into creditors’ voluntary liquidation.

Tecnologie Fluenti Pty Ltd had been incorporated only two weeks prior to the appointment of the Liquidators, for the purpose of acquiring and operating the business of Intellicomms. The sole director and shareholder was Ms Haynes’ sister, Ms Gigliotti, who was previously employed by Intellicomms as a financial and payroll administrator.

The Court held that the “ultimate question for consideration was whether the Liquidators had established that the amount payable under the sale agreement was less than its market value and the best price reasonably obtainable for those assets within the meaning of s 588FDB and, if so, whether the relief sought by the Liquidators should be granted” (at [21]).

Therefore, the real issue before the court was about the value of the assets

*McDonald and Anor v Hanselmann,* Matter No 3480/97 [1998] NSWSC 171, Young J.

Followed in *Campbell Street Theatre Pty Ltd (receiver and manager appointed) (in liquidation) & Ors v Commercial Mortgage Trade Pty Ltd & Anor* [2012] NSWSC 669 (19 June 2012)

“Value is not a matter which is to be decided in a vacuum. Value usually is associated with a person. The pure concept of value is, of course, what a reasonable objective person would pay for the property rather than lose it, but very often property will have a special value to a person because of factors unique to that person. …

Again, when one is looking at a company on the verge of liquidation, one bears in mind the words Shakespeare attributed to Richard the Third "A horse! A horse! My kingdom for a horse!".”

Shakespeare; "The first thing we do, let's kill all the lawyers“

Henry VI, Part 2, Act IV, Scene 2

#### The Decision

There was no issue that the sale agreement prevented the assets from being available for the benefit of creditors in the winding up (per s 588FDB(1)(b)) and that it was entered into when Intellicomms was insolvent (per s 588FE(6B)(b)). The proceeding was also commenced within the time period prescribed by s 588FF(3)(a)(i).

The court considered the transaction and circumstances surrounding it.

The timing of the transaction was not explained by Ms Haynes.

On the day, a statutory demand was due to expire, for a debt of $923,310.

For unknown reasons, the director caused several valuations to be obtained in February, July, August and September 2021. The material upon which the valuations were based indicated an increasingly pessimistic expectation for the company and resulted in the valuations decreasing over time.

The Court was satisfied that the director obtained these valuations with the intention of minimising the consideration, such that it was significantly under value. It also appeared that the director was active in arranging for her sister to be the director and shareholder of the purchaser to “give the appearance of Ms Haynes being once removed from the purchaser” (at [229]).

The Liquidators did not need to establish what was the value of the business/assets, but merely had to establish that, “on the balance of probabilities, the consideration payable under the sale agreement was less than both limbs in s 588FDB” (at [235]).

There was no evidence that Intellicomms sought to sell its assets to a third party or ascertain the real market value of its assets. However, there was clear evidence that an unrelated entity was interested in purchasing the assets at between $500,000 and $1,000,000.

The sale appeared to be “negotiated in secret” to deprive the unrelated party “of an opportunity to make an offer for the business” (at [230]). This was despite it being apparent that the unrelated party was in a position to purchase Intellicoms and its assets for a price that would have benefitted its creditors. The director was “well aware of QPC’s interest in Intellicomms’ business and with the assistance of her advisors, embarked on a plan to frustrate the legitimate motives of QPC in retrieving its commercial position” (at [232]).

Note; the limitation period for the Liquidator to sue the advisors has not passed.

The Court held that the sale agreement was a creditor-defeating disposition and used the expressions “brazen and audacious” when describing the phoenix transaction.

The Liquidators were able to establish, on the balance of probabilities, that the consideration payable under the sale agreement was less than both the limbs in section 588FDB (see below), the Court made the declaration that the sale agreement was void.

### CORPORATIONS ACT 2001 - SECT 588FDB

**Creditor-defeating disposition**

             (1)  A disposition of [property](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1233.html#property) of a company is a ***creditor-defeating disposition***if:

                     (a)  the consideration payable to the company for the disposition was less than the lesser of the following at the time the [relevant agreement](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#relevant_agreement) (as defined in [section 9)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html) for the disposition was [made](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1371.html#made) or, if there was no such [agreement](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#agreement), at the time of the disposition:

                              (i)  the market [value](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#value) of the [property](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1233.html#property);

                             (ii)  the best price that was reasonably obtainable for the [property](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1233.html#property), having regard to the circumstances existing at that time; and

                     (b)  the disposition has the effect of:

                              (i)  preventing the [property](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1233.html#property) from becoming available for the benefit of the company's creditors in the winding-up of the company; or

                             (ii)  hindering, or significantly delaying, the process of making the [property](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1233.html#property) available for the benefit of the company's creditors in the winding-up of the company.

**CORPORATIONS ACT 2001 - SECT 588GAB**

**Officer's duty to prevent creditor-defeating disposition**

             (1)  An [officer](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s416.html#officer) of a company must not engage in conduct that [results](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#result) in the company making a creditor-defeating disposition of [property](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1233.html#property) of the company, if:

                     (a)  the company is insolvent; or

                     (b)  the company becomes insolvent because of the disposition or a number of dispositions [made](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1371.html#made) at the time of the disposition; or

                     (c)  less than 12 months after the disposition, the start of an external [administration](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#administration) (as defined in Schedule 2) of the company occurs as a direct or indirect [result](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#result) of the disposition; or

                     (d)  less than 12 months after the disposition, the company ceases to carry on business altogether as a direct or indirect [result](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#result) of the disposition.

Note 1:       Failure to comply with this [subsection](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fp.html#subsection) is an offence: see [subsection](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fp.html#subsection) 1311(1).

Note 2:       [Recklessness](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s910a.html#recklessness) is the fault element for the [result](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#result) of the company making the creditor-defeating disposition and for [paragraphs](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fp.html#paragraph) (1)(a), (b), (c) and (d): see section 5.6 of the *Criminal Code*.

 Note:          [Section 588GA](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588ga.html) also [provides](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s761a.html#provide) for [subsections](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fp.html#subsection) (1) and (2) of this section not to apply if the disposition was connected with a course of action likely to lead to a better outcome for the company.

**CORPORATIONS ACT 2001 - SECT 588GAC**

**Procuring creditor-defeating disposition**

             (1)  A [person](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s761a.html#person) must not engage in conduct of procuring, inciting, inducing or encouraging the making by a company of a disposition of [property](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1233.html#property) that [results](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#result) in the company making the disposition of the [property](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1233.html#property), if:

                     (a)  one or more of the following applies:

                              (i)  the company is insolvent;

                             (ii)  the company becomes insolvent because of the disposition or a number of dispositions [made](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1371.html#made) at the time of the disposition;

                            (iii)  less than 12 months after the disposition, the start of an external [administration](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#administration) (as defined in Schedule 2) of the company occurs as a direct or indirect [result](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#result) of the disposition;

                            (iv)  less than 12 months after the disposition, the company ceases to carry on business altogether as a direct or indirect [result](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#result) of the disposition; and

                     (b)  the disposition is a creditor-defeating disposition.

Note 1:       Failure to comply with this [subsection](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fp.html#subsection) is an offence: see [subsection](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fp.html#subsection) 1311(1).

Note 2:       [Recklessness](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s910a.html#recklessness) is the fault element for the [result](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#result) of the company making the disposition and for subparagraphs (1)(a)(i), (ii), (iii) and (iv) and [paragraph](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fo.html#paragraph) (1)(b): see section 5.6 of the *Criminal Code*.

**2. Insolvency principles that were tested during 2022**

[***Pearce, in the matter of Bandiera Holdings Pty Ltd (Receiver Appointed) (in liquidation) v Bandiera Holdings Pty Ltd* [2022] FCA 876**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2022/876.html?context=1;query=Pearce,%20in%20the%20matter%20of%20Bandiera%20Holdings;mask_path=)

###### An accounting firm **unsuccessfully** applied to discharge a summons for public examination that required production of their professional indemnity insurance policy.

###### Order; Subject to the agreement of the parties or order of the Court to the contrary, …, as liquidators of Bandiera Holdings Pty Ltd (receiver appointed) (in liq) (the Company), undertake to restrict access to any policy of insurance produced by Accountant in answer to paragraph 19 of the Summons issued by the Court to them on 16 June 2022 to the following persons:

###### (a) the liquidators and their professional staff with involvement in the liquidation of the Company, or their administrative staff for the sole purpose of assisting the liquidators and their staff;

###### (b) the solicitors and counsel retained by the liquidators, or their administrative staff for the sole purpose of assisting the solicitors or counsel;

###### (c) any actual or proposed litigation funder of the liquidators and any solicitors or counsel retained by any actual or proposed litigation funder, provided that they have agreed in writing to be bound by a like confidentiality regime; and

###### (d) any judicial officers or administrative staff of the Court.

**2. Insolvency principles that were tested during 2022**

*Aviation 3030 Pty Ltd (in liq) v Lao, in the matter of Aviation 3030 Pty Ltd (in liq) [2022] FCA 458*

The Federal Court of Australia has confirmed that a liquidator of a solvent company can pursue unreasonable director-related transaction claims under s 588FDA of the Corporations Act 2001 (Cth) (Act) for the benefit of the company's shareholders.

**s. 588FDA Unreasonable director-related transactions**

             (1)  A [transaction](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#transaction) of a company is an [***unreasonable director-related transaction***](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#unreasonable_director-related_transaction)of the company if, and only if:

                     (a)  the [transaction](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#transaction) is:

                              (i)  a payment [made](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1371.html#made) by the company; or

                             (ii)  a conveyance, transfer or other disposition by the company of [property](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1233.html#property) of the company; or

                            (iii)  the [issue](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s761a.html#issue) of [securities](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s602.html#securities) by the company; or

                            (iv)  the incurring by the company of an obligation to [make](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1551.html#make) such a payment, disposition or [issue](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s761a.html#issue); and

                     (b)  the payment, disposition or [issue](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s761a.html#issue) is, or is to be, [made](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s1371.html#made) to:

                              (i)  a director of the company; or

                             (ii)  a close [associate](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#associate) of a director of the company; or

                            (iii)  a [person](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s761a.html#person) on behalf of, or for the benefit of, a [person](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s761a.html#person) mentioned in subparagraph (i) or (ii); and

                     (c)  it may be expected that a reasonable [person](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s761a.html#person) in the company's circumstances would not have entered into the [transaction](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#transaction), having regard to:

                              (i)  the benefits (if any) to the company of entering into the [transaction](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#transaction); and

                             (ii)  the detriment to the company of entering into the [transaction](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#transaction); and

                            (iii)  the respective benefits to other parties to the [transaction](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s9.html#transaction) of entering …

**2. Insolvency principles that were tested during 2022**

###### **McMillan v Warner (Trustee) [2022] FCAFC 20.**

###### The Full Federal Court has held that a transfer of the matrimonial home, from a husband and wife to the wife solely, some 16 years before the husband's bankruptcy, did not have the 'main purpose' of preventing the house from becoming divisible among the husband's creditors.

The Facts

Brian McMillan became bankrupt on 6 November 2018. Mr McMillan was the sole director of McMillan Prestige Car Repairs Pty Ltd (the Company). The Company originally conducted a successful panel beating and spray-painting business focused on luxury vehicles (in Queen street, near McDonalds on Parramatta Road, Croydon).

In late 2000, Rolls-Royce and Bentley approached Mr McMillan with a proposal under which he would operate a car dealership as the sole NSW and ACT dealer of Rolls-Royce and Bentley cars. The Company entered into a Dealer Agreement with Rolls-Royce in February 2001.

In mid-2001, Rolls-Royce introduced Mr McMillan to Volkswagen Financial Services (VWFS), and suggested that he take out floor-plan facility with VWFS. Rolls-Royce suggested to him that it was 'of paramount importance' that he 'establish the business on a solid financial footing, and expressed concern that there was an 'absence of financial separation between [his] personal situation and that of the business'.

In May 2002, Mr and Mrs McMillan transferred the Property to Mrs McMillan in her sole name. In July 2002, Mrs McMillan mortgaged the Property to St.George Bank.

The Court rejected the evidence of Mr McMillan that he transferred the Property to Mrs McMillan not to defeat his creditors, but because she had asked him to do so and it was done out of love.

The Full Court unanimously overturned the trial judge's decision, without disturbing the rejection of Mr McMillan’s evidence and held that the trustee had not established that the 'main purpose' of the transfer of the Property was to defeat Mr McMillan's creditors.

The Full Court placed weight on the 2001 letter from Rolls-Royce which recommended to Mr McMillan that he should separate his 'personal' and 'business' affairs, as an alternative explanation.

The Court emphasised that the burden of proving a transferor's 'main purpose' lies with the trustee, not with the defendant. The Court said at [195] that an inference 'that the main purpose of a bankrupt in making a transfer of property was to defeat his or her creditors must be a reasonable and definite inference, not merely one of a number of conflicting inferences with equal degree of probability'.

In overturning the finding that the 'main purpose' of the transfer was to defeat creditors, the Court placed weight on:

* the lack of any 'temporal connection' between the transfer and the liabilities that ultimately resulted in Mr McMillan's bankruptcy in 2018
* the guarantee Mrs McMillan provided for the St.George loan, which had paid out the Commonwealth Bank business loan
* the mortgage Mrs McMillan granted to St.George
* the Court's finding that the new business venture of the dealership was not a risky venture, and represented a diversification of Mr McMillan's existing, profitable business into a related activity in the same industry, dealing with 'the same products and customers', and with the 'full support' of Rolls-Royce
* financial information that suggested, at the time of the transfer, the Company had surplus working capital, current assets that exceeded current liabilities, and significant cash at bank

# A COVID case

# Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited [2023] HCA 6 (8 March 2023)

1. The contract was dated 31 January 2020. It provided for the sale of freehold hotel property in Pyrmont, Sydney (the Quarrymans Hotel) ("the Property"), together with an associated hotel Licence (being a specified hotel licence under the [*Liquor Act 2007*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/la2007107/) (NSW) and nine Gaming Machine Entitlements allocated to that Licence) and the Business[**[1]**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/6.html#fn1). The Business was defined as the hotel business trading as the Quarrymans Hotel which operates pursuant to the Licence (cl 33.1). The appellant was the Vendor. The first and second respondents together were the Purchaser. The first respondent was the purchaser of the Property and the Licence. The second respondent was the purchaser of the Goodwill, Plant and Equipment and remaining Business Assets**[[2]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2023/6.html%22%20%5Cl%20%22fn2)**. Under cl 65.1 of the contract, the sale of the Property, Licence, and Gaming Machine Entitlements was conditional upon, and interdependent with, the sale of the Business Assets. The total purchase price was $11,250,000.
2. Clause 50 is the key provision. It was headed "Management Prior to Completion". Clause 50.1, headed "Dealings Pending Completion", provided that:

"Subject to clause 50.2, from the date of this contract until Completion, *the Vendor must carry on the Business in the usual and ordinary course as regards its nature, scope and manner* and repair and maintain the Assets in the same manner as repaired and maintained as at the date of this Contract and use reasonable endeavours to ensure all items on the Inventory are in good repair and in proper working order having regard to their condition at the date of this Contract, fair wear and tear excepted." (emphasis added)

31. Accordingly, a reasonable businessperson in the position of the parties would have understood cl 50.1 to mean that from the date of the contract until Completion, the Vendor was required to carry on the Business "in the usual and ordinary course as regards its nature, scope and manner" in accordance with law. The past, current, and anticipated future lawfulness of the operation of the Business was objectively essential and a commercial necessity to the parties. Without the Licence and associated Gaming Machine Entitlements, there would be no "Business". The Vendor's obligation to "carry on the Business in the usual and ordinary course as regards its nature, scope and manner", on the proper construction of that provision, could never extend to an obligation on the Vendor to act illegally. The Vendor's obligation was necessarily moulded by, and subject to, the operation of the law from time to time.

1. For these reasons, the Vendor was complying with cl 50.1 (and cll 58.1 and 58.2) of the contract at the time of Completion. The fact that the then extant public health order prevented the Vendor from carrying on the Business in the same way as it had been carried on at the contract date did not mean that the Vendor was not complying or could not comply with cl 50.1. The Vendor was "ready, willing and able to complete and ... not in default" in accordance with cl 51.7(b). Accordingly, the Vendor was able to serve the notice to complete making time of the essence for Completion as provided for in cl 51.7(b)(ii). By not completing as required, the Purchaser was in breach of the contract in an essential respect, entitling the Vendor to terminate the contract by notice under cl 63.1 (and to keep the Deposit and sue for damages).

3. Developments and trends for Insolvency Practice

1. Preferential payments
2. Director related transactions

[CORPORATIONS ACT 2001 - SECT 588FDA Unreasonable director-related transactions (austlii.edu.au)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s588fda.html)

1. Creditor defeating transactions
2. Equitable interests in real property
3. The Parliamentary Joint Committee on Corporations and Financial Services has an inquiry into corporate insolvency in Australia. The committee currently intends to table a report in both Houses of the Parliament by 30 May 2023 (see https://www.aph.gov.au/Parliamentary\_Business/Committees/Joint/Corporations\_and\_Financial\_Services/CorporateInsolvency )

Last year

1. Director ID Numbers
2. One-year bankruptcy
3. Director’s Resignations
4. ASIC orders about creditor-defeating dispositions
5. Bankruptcy Amounts

**The Parliamentary Joint Committee on Corporations and Financial Services: Terms of Reference (as agreed on 28 September 2022)**

Inquiry into the effectiveness of Australia’s corporate insolvency laws in protecting and maximising value for the benefit of all interested parties and the economy, including:

1. recent and emerging trends in the use of corporate insolvency and related practices in Australia, including in regard to:
	1. temporary COVID-19 pandemic insolvency measures, and other policy measures introduced in response to the pandemic that may have had an effect on such trends and practices;
	2. recent changes in domestic and international economic conditions, increases in material and input costs for businesses and inflationary pressures more broadly, and supply shortages in certain industries; and
	3. any other contributory factors or events that have impacted insolvency patterns;
2. the operation of the existing legislation, common law, and regulatory arrangements, including:
	1. the small business restructuring reforms (2021);
	2. the simplified liquidation reforms (2021);
	3. the unlawful phoenixing reforms (2019); and
	4. the operation of the *Personal Property Securities Act 2009* in the context of corporate insolvency;
3. other potential areas for reform, such as:
	1. unfair preference claims;
	2. trusts with corporate trustees;
	3. insolvent trading safe harbours; and
	4. international approaches and developments;
4. supporting business access to corporate turnaround capabilities to manage financial distress;
5. the role, remuneration, financial viability, and conduct of corporate insolvency practitioners (including receivers, liquidators, administrators, and small business restructuring practitioners);
6. the role of government agencies in the corporate insolvency system, including:
	1. the role and effectiveness of ASIC as the corporate insolvency regulator;
	2. the ATO’s role and enforcement approaches to corporate insolvency, and relevant changes to its approach over the course of the COVID-19 pandemic;
	3. the role, funding and operation of relevant bodies, including the Assetless Administration Fund and the Small Business Ombudsman; and
7. any related corporate insolvency matters.

**The Presenter’s background;**

**Geoffrey McDonald**

**Insolvency Accountant, then Barrister**

* **1987 became a partner, the youngest ever of an accounting firm, aged 23**
* **1988 became a registered liquidator, then also registered as an auditor, tax agent and then Trustee in bankruptcy**
* **I went to the Bar in the late 1990s.**
* **I was told that I was the first person to be granted a Practicing certificate as a barrister whilst also practicing as an accountant.**
* **I soon became National Chairman of Hall Chadwick.**
* **I left Accounting to practise as a Barrister in 2008.**
* **As Albert Einstein once said;**

**“the fate of the old one, recognises the culture of the young”**

