

Australian Appellate Decisions in Insolvency Law: Recent Updates

Paper prepared for the 35th Annual BFSLA Conference in Queenstown, New Zealand
(1-3 September 2018)¹

- 1 This paper provides a snapshot of three recent, Australian appellate decisions in insolvency law. Together, these decisions address a spectrum of issues which arise in insolvency disputes: namely, the principles governing liquidators' remuneration, the duties of administrators and liquidators, and the recovery of payments as unfair preferences, respectively.

Liquidators' remuneration: *Sakr Nominees*

- 2 First, in *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* (2017) 93 NSWLR 459; [2017] NSWCA 38 ("*Sakr Nominees*") a five-judge bench of the NSW Court of Appeal unanimously allowed an appeal with respect to a judicial determination of a liquidator's remuneration.² This case articulated the factors to be considered by a court upon a liquidator's application for a remuneration determination.
- 3 The primary judge had made an order pursuant to s 473(3)(b)(ii) of the *Corporations Act 2001* (Cth) (the CA), determining Mr Sanderson's remuneration as liquidator of Sakr Nominees in an amount of \$20,000 including GST.³ The appeal turned upon the proper construction of s 473 of the CA (as it stood at that time). The questions raised on appeal were described by the Court of Appeal as matters of "general importance" in relation to the courts' power in fixing liquidators' remuneration.⁴

¹ Again, I am indebted to the Equity Researcher, Ms Alyssa Glass, for her assistance in the preparation of this paper.

² Beazley P, Gleeson JA, Barrett and Beach AJJA all agreed with the judgment of Bathurst CJ: *Sakr Nominees* at [69], [70], [71] and [72] respectively.

³ *Ibid* at [1] per Bathurst CJ.

⁴ *Ibid* at [2].

- 4 Section 473 was repealed with effect from 1 September 2017 by the *Insolvency Law Reform Act 2016* (Cth). However, the *Sakr* decision remains significant, not least because the factors in s 473(10) have been replicated in the new corporate insolvency law and, moreover, now apply to the remuneration of trustees in bankruptcy as well.⁵
- 5 In determining Mr Sanderson’s remuneration at \$20,000, the primary judge had stated that liquidators would not necessarily be allowed remuneration at their firm’s standard hourly rates, particularly in smaller liquidations where questions of proportionality, value and risk loomed large. His Honour considered that in such liquidations, liquidators could not expect to be rewarded for their time at the same hourly rate as would be justifiable if more property was available. Further, his Honour held that, while not without its shortcomings, *ad valorem* remuneration is inherently proportionate and incentivises the creation of value rather than the disproportionate expenditure of time.⁶
- 6 On appeal, although much of the debate in the submissions had centred on the respective merits of what were described as time-based remuneration and *ad valorem* remuneration, the critical question was – as Bathurst CJ noted – whether the primary judge erred in his determination of *reasonable* remuneration. At [51], Bathurst CJ said:

Section 473 of the Act does not provide for any particular method of calculation but refers to remuneration by way of percentage or otherwise. Thus if a judge taking into account the evidence of the work done and the matters in s 473(10) came to the view that remuneration calculated by way of a particular proportion of assets recovered or assets distributed was reasonable, he or she would be entitled to fix remuneration on that basis. Similarly if a judge after considering the work done and the relevant factors in s 473(10) concluded that remuneration calculated on a time basis was reasonable, he or she would be entitled to fix remuneration on that basis.

- 7 It can be seen from these remarks, and from the observations which follow, that reasonableness is the touchstone of the determination and that this

⁵ See Insolvency Practice Schedule (Corporations) 2016 (Cth) s 60-12 and Insolvency Practice Schedule (Bankruptcy) 2016 (Cth) s 60-12; supplemented by Insolvency Practice Rules (Corporations) 2016 (Cth) s 60-15 and Insolvency Practice Rules (Bankruptcy) 2016 (Cth) s 60-15.

⁶ *Ibid* at [16]-[17].

determination is fact-specific. His Honour emphasised that it would be inappropriate to fix remuneration on an *ad valorem* basis simply by applying to all liquidations (or to a particular class of liquidations) a percentage considered appropriate, without regard to the particular work done or required to be done in the specific liquidation in question. Such a course would disregard the requirements of s 473(10), which direct attention to the particular liquidation under consideration by the Court.⁷

- 8 As to proportionality, the Court of Appeal recognised that, as the Full Court of the Federal Court had held in *Templeton v Australian Securities and Investments Commission* [2015] FCAFC 137; (2015) 108 ACSR 545, proportionality is a well-recognised factor in considering the question of reasonableness and the factors in s 473(10)(d)-(e) and (g)-(h) have the concept of proportionality as their “unifying theme”. In *Templeton*, the Federal Court had recognised (at [32]) that proportionality, in terms of work done as compared with the size of the property the subject of the insolvency administration or the benefit to be obtained from the work, is an important consideration in determining reasonableness, but that the work done must also be proportionate to the difficulty and importance of the task in the context in which it needs to be performed (stating that that is what is encompassed in assessing the value of the services rendered).⁸
- 9 Further, Bathurst CJ noted, as was pointed out by Black J in *In the matter of Idyllic Solutions Pty Ltd as trustee for Super Save Superannuation Fund* [2016] NSWSC 1292; (2016) 115 ACSR 581 (at [50]), that evidence as to what percentage of realisation the remuneration constitutes will at least provide a measure of objective testing of the reasonableness of the

⁷ Ibid at [52].

⁸ Ibid at [55], citing *Templeton v Australian Securities and Investments Commission* [2015] FCAFC 137; (2015) 108 ACSR 545 at [33] (the Federal Court there endorsing the observations of McLure JA in *Conlan (as liquidator of Rowena Nominees Pty Ltd) v Adams* [2008] WASCA 61; (2008) 65 ACSR 521 at [47]).

remuneration claimed, and will “identify those cases in which there ought to be a real concern in that respect”.⁹

- 10 Bathurst CJ noted that the mere fact that the work performed does not lead to augmentation of the funds available for distribution does not mean that the liquidator is not entitled to be remunerated for it (referring in this regard to *Warner, Re GTL Tradeup Pty Ltd (in liq)* [2015] FCA 323; (2015) 104 ACSR 633 at [71] per Farrell J). His Honour was cognisant of the criticisms that have been levelled against time based charging and recognised the force of those criticisms, however emphasised at [59]-[60] that:

[I]t remains the responsibility of the Court to fix reasonable remuneration on the evidence before it, taking into account the matters referred to in s 473(10). That must include, in my opinion, considering the work done by the liquidator, whether it was reasonable to carry it out and the appropriateness of the amount charged for it. Such an evaluative process, whilst difficult in some circumstances, does not seem to me to be beyond the competence of the Court.

Further, it should not be concluded from what I have written that a time based calculation will always be appropriate. The task of the Court is to fix reasonable remuneration having regard to the evidence before it and taking into account the matters in s 473(10). Thus for example, the “Lodestar” approach explained by Finkelstein J in *Re Korda* supra at [47] [*Re Korda; in the matter of Stockford Ltd* (2004) 140 FCR 424; [2004] FCA 1682], may in some circumstances be an appropriate method of undertaking the task: see also *Re Clout* supra at [134]-[135] [*Re Clout in its capacity as liquidator of Mainz Developments Pty Ltd (in liq)* [2016] NSWSC 1146; (2016) 115 ACSR 459].

- 11 To similar effect, Barrett AJA added at [71] that:

[I]t is, in my view, impossible to say, as a general proposition, that any given basis – whether according to time, value, extent of recoveries, size of company, nature of company or any other factor – merits any claim to precedence over any other in the matter of determination of liquidators’ remuneration.

- 12 As to the primary judge’s approach, the Court of Appeal held that the primary judge erred in failing to consider the evidence presented by the liquidator and the factors in s 473(10) relevant to the assessment of remuneration. His Honour erred in focussing solely on proportionality and failing to consider the

⁹ *Sakr Nominees* at [56] per Bathurst CJ.

work actually done and whether the amount charged for it was proportionate to the difficulty and complexity of the tasks performed.¹⁰

13 In these circumstances, the appeal was allowed and the proceedings remitted to the Equity Division. By way of postscript, the ultimate result upon that remittal was that Black J concluded (with regard to additional evidence adduced at that point) that the additional amount of remuneration claimed by Mr Sanderson could properly be allowed on a time basis and was reasonable.¹¹

14 Before leaving *Sakr Nominees*, it is worth noting Bathurst CJ's comments about cases where work is undertaken by a liquidator in an unsuccessful attempt to recover assets, whether at the request of creditors or otherwise. His Honour noted that, as was pointed out in *Hall v Poolman* (2009) 75 NSWLR 99; [2009] NSWCA 64 at [128]-[129], there is a public interest in liquidators bringing recovery proceedings, such as proceedings against directors for breach of duty or insolvent trading and proceedings for recovery of unfair preferences. However, his Honour went on to say (at [58]):

[T]he liquidator is obliged to make any decision to bring such proceedings with care, and negligence in the exercise of the power to bring proceedings may lead to a liquidator being deprived of costs: *Hall v Poolman* supra at [144]-[145].

15 This brings me to the second case I will consider, which concerns, inter alia, a liquidator's decision to initiate and maintain a series of proceedings against a debtor of the companies under liquidation.

The duties of administrators and liquidators: *Macks v Viscariello*

16 At the end of last year, the Full Court of the South Australian Supreme Court handed down judgment in *Macks v Viscariello* (2017) 130 SASR 1; [2017] SASCFC 172 ("*Macks*"). This decision concluded long-running litigation over two companies which entered administration, and then liquidation, more than

¹⁰ Ibid at [63]-[64].

¹¹ *In the matter of Sakr Nominees Pty Ltd* [2017] NSWSC 668 at [29]-[31].

fifteen years ago, and is particularly instructive as to the duties imposed on insolvency practitioners – including when conducting litigation on behalf of the company or companies the subject of the insolvency administration.

- 17 The respondent, Mr Viscariello, was the sole director and effective controller of two companies, Bernsteen Pty Ltd and Newmore Pty Ltd. The companies sold manchester through retail outlets trading under the names “Bedroom Mazurka” and “Faulty Sheets and Towels”.¹²
- 18 The companies experienced financial difficulties in late 2001, and Mr Viscariello sought to resolve those difficulties by entering into a heads of agreement for the sale of the businesses. The agreement included terms that significantly affected a secured creditor of the companies, ARL. In December 2001, Mr Viscariello determined that the companies were insolvent or likely to become insolvent in the near future, and Mr Macks was appointed as their administrator.¹³
- 19 Although Mr Viscariello anticipated that, following Mr Macks’ appointment, the companies would enter into deeds of company arrangement that gave effect to the heads of agreement for the sale of the businesses, ARL (the secured creditor) refused to consent. Accordingly, Mr Macks advised creditors that there was no alternative for the companies but to go into liquidation – which they did, on 21 December 2001. Mr Macks was appointed as the liquidator.¹⁴
- 20 Mr Viscariello commenced proceedings against Mr Macks in February 2006, alleging that the latter had misled creditors, breached the duties he owed as the administrator of the companies, and sold the companies’ assets at an undervalue. Mr Viscariello also claimed to have lost the chance to avoid losses suffered as a consequence of the companies being wound up.¹⁵

¹² *Macks* at [1].

¹³ *Ibid* [4].

¹⁴ *Ibid* [4]-[5].

¹⁵ *Ibid* [7].

- 21 During the course of the liquidation, Mr Macks was involved in a number of proceedings (together, the Hamilton-Smith proceedings) against a debtor of the company, Ms Hamilton-Smith (Mr Viscariello's partner). Mr Macks had sold some of Bernstein's stock to Ms Hamilton-Smith; she defaulted under the sale agreement; and in August 2002, Bernstein commenced proceedings in the Magistrates Court to recover the sum of \$28,000 (the amount payable for the stock) (the Bernstein action).¹⁶ Ms Hamilton-Smith responded by counterclaiming against Mr Macks and embarking upon what the Court described as a "campaign of interlocutory attrition",¹⁷ in which she argued "every point at every stage of the process".¹⁸
- 22 In June 2005, on the advice of his legal advisors, Mr Macks refused an offer by Ms Hamilton-Smith to settle the Bernstein action, and became involved in a second set of proceedings against Ms Hamilton-Smith, which involved Mr Macks indemnifying a third party (Ms George) for the cost of presenting a petition for bankruptcy against Ms Hamilton-Smith (Ms George had previously obtained a judgment against Ms Hamilton-Smith for an amount of approximately \$5,000). Ms Hamilton-Smith responded by commencing fresh proceedings against Ms George, and the bankruptcy proceedings became "enmeshed in interlocutory disputes".¹⁹
- 23 In short, by April 2006, Ms Hamilton-Smith had not been declared bankrupt, three sets of proceedings remained on foot, and Bernstein was continuing to incur substantial legal expenses. At this time, Mr Macks' legal advisors advised him that there would be no benefit to creditors in continuing to pursue the Hamilton-Smith proceedings and discussed various strategies for concluding the litigation. It was not until February 2007 that the Hamilton-Smith proceedings were settled, by which time the companies had incurred a combined total of approximately \$460,000 in legal expenses.²⁰

¹⁶ *Ibid* [8].

¹⁷ *Ibid* [9].

¹⁸ *Hamilton-Smith v Bernstein Pty Ltd (in liq)* [2005] SASC 190 at [21] per Gray, Sulan and White JJ.

¹⁹ *Macks* at [10]-[11].

²⁰ *Viscariello v Macks* [2014] SASC 189; (2014) 103 ACSR 542 at [704]-[705] per Kourakis CJ.

- 24 These events were the subject of further claims by Mr Viscariello against Mr Macks. It was alleged that Mr Macks had breached the duties that he owed as the liquidator of Bernsteen by agreeing to indemnify Ms George and by conducting and expending the company's funds on the Hamilton-Smith proceedings.²¹
- 25 A lengthy trial of Mr Viscariello's claims was held and the primary judge delivered reasons for judgment in which his Honour upheld some, and dismissed others, of Mr Viscariello's claims.
- 26 The primary judge dismissed the claims made against Mr Macks in his capacity as the administrator of the companies, finding that the liquidation of the companies had been inevitable and that Mr Macks had not misled creditors nor breached his duties by, for example, selling the companies' assets at an undervalue. Mr Viscariello appealed from those findings by way of cross-appeal.²²
- 27 As to the claims made against Mr Macks in his capacity as the liquidator of Bernsteen, the primary judge found that Mr Macks breached the duties that he owed under each of ss 180, 181, and 182 of the CA by continuing to prosecute the Bernsteen action after June 2005 and by initiating and maintaining the bankruptcy proceedings. His Honour characterised Mr Macks' conduct as unreasonable and found that he had been actuated by collateral and improper purposes in pursuing the Hamilton-Smith Proceedings. The primary judge ordered that Mr Macks be removed as liquidator of the companies (pursuant to s 503 of the CA), and made declarations to give effect to the findings of breach.²³ However, his Honour refused Mr Viscariello's claim for compensation, on the basis that Mr Viscariello lacked standing to seek damages or equitable compensation for a breach of the duties owed by Mr Macks to Bernsteen.²⁴

²¹ *Macks* at [13].

²² *Ibid* [15]-[16].

²³ *Ibid* [72].

²⁴ *Ibid* [17].

- 28 Mr Macks appealed from those findings. He complained about delay in delivery of the reasons (which were delivered approximately 21 months after the completion of the trial) and contended that the reasons did not adequately explain the findings of breach. Mr Macks also submitted that he had been denied procedural fairness, because it was not alleged at trial that he had acted for an improper purpose in pursuing the Hamilton-Smith proceedings. He alleged on appeal that the primary judge had made multiple errors of fact and failed to engage with the whole of the evidence in making his findings and argued that, in any event, the Court did not have power to make declarations to the effect that he had contravened ss 180-182 of the CA.²⁵
- 29 As to Mr Viscariello's cross-appeal, the Full Court emphasised at the outset that the question whether Mr Viscariello possessed any right that could found a claim for damages or compensation was fundamental to the cross-appeal.²⁶ That question involved determining whether the primary judge had erred in holding that the preparation and dissemination of the s 439A report and the provision of information to creditors was not conduct in trade or commerce. It also involved considering the nature of the duties owed by a voluntary administrator.
- 30 As to the latter, the Court held that an administration does not owe statutory or general law duties to individual creditors, and that, absent a statutory entitlement, a creditor has no personal right of action against an administrator for damages or compensation. Mr Macks did not owe Mr Viscariello a duty in the conduct of the administration which was enforceable by Mr Viscariello under the general law.
- 31 While it is well-established that an administrator is a fiduciary,²⁷ what was at issue here was the content of that fiduciary duty, and the question of whether

²⁵ Ibid [18].

²⁶ Ibid [182].

²⁷ See, for example, the authorities cited by the Full Court at [187]-[188], including: *Hill v David Hill Electrical Discounts Pty Ltd* [2001] NSWSC 271; (2001) 37 ACSR 617 at [19] per Santow J; *Correa v Whittingham* [2013] NSWCA 263; (2013) 278 FLR 310 at [148] per Gleeson JA (with whom Barrett JA and Tobias AJA agreed); *Blundell v Macrocom Pty Ltd* [2004] NSWSC 895; (2004) 50 ACSR 549 at [10] per Barrett J (as his Honour then was).

Mr Macks owed a duty to individual creditors that could be enforced by an action for damages or compensation.²⁸ At [192], the Court said:

It is to be noted that the passages cited above from the judgments of Gleeson JA in *Correa v Whittingham* and Barrett J in *Blundell v Macrocom* identified the fiduciary relationship as subsisting between an administrator and the company in administration. We do not think that their Honours were merely defining the relationship in a general sense. Rather, we consider that the Primary Judge was right to reject, albeit tentatively, the proposition that an administrator owes a duty to individual creditors. In our view, an administrator does not owe statutory or general law duties to individual creditors. Absent a statutory entitlement, a creditor has no personal right of action against an administrator for damages or compensation. The directors of a company, including a company that is nearly insolvent, do not owe duties to individual creditors and we are unable to discern any basis for reaching a different conclusion for administrators.

- 32 The Court relied upon the High Court's rejection, in *Spies v The Queen*, of the proposition that directors owed duties to individual creditors.²⁹ At [200], the Court emphasised that a liquidator's common law duty of care in disposing of a company's assets cannot be equated with a liquidator's fiduciary duties in exercising his or her powers in winding up the affairs of an insolvent company, the source and nature of the duties being entirely different.
- 33 In *Mills v Sheahan*, the Full Court had held that the allegation that the liquidator owed a duty of care could not be struck out on an interlocutory application as not disclosing a reasonably arguable cause of action (only one member of the Court, Debelle J, there making the positive finding that the liquidator did owe a duty of care).³⁰ In *Perpetual Nominees Ltd v McGoldrick (No 3)*, the Victorian Supreme Court substantially endorsed the analysis of Debelle J in *Mills*.³¹
- 34 In *Macks*, the point emphasised by the Full Court was that imposition of a duty in favour of individual creditors may be inconsistent with the statutory scheme created by Pt 5.3A of the CA. Moreover, their Honours said (at [203]-[208]):

²⁸ *Macks* at [189].

²⁹ *Spies v The Queen* (2000) 201 CLR 603; [2000] HCA 43 at [93]-[95] per Gaudron, McHugh, Gummow and Hayne JJ. The Full Court also referred to *Geneva Finance Ltd v Resource & Industry Ltd* [2002] WASC 121; (2002) 169 FLR 152 at [26] per EM Heenan J.

³⁰ *Mills v Sheahan* (2007) 99 SASR 357; [2007] SASC 365.

³¹ *Perpetual Nominees Ltd v McGoldrick (No 3)* [2017] VSC 78; (2017) 317 FLR 227.

First, Mr Viscariello did not contend in the appeal that Mr Macks owed a common law duty of care in relation to the preparation of the s 439A report and the conduct of the second creditors' meeting. He did not embark upon the analysis that would have been required on authorities such as *Mills* and *Perpetual*. More conclusively, Mr Viscariello did not challenge the Primary Judge's conclusions to which we have referred.

Second, the Primary Judge's discussion of *Mills* focused on the imposition of a common law duty of care. His Honour did not consider what, if any, implications the decision had for the question whether a liquidator owed fiduciary duties to individual creditors — that is, duties that could be enforced by a creditor in an action for damages or compensation.

That question was also not considered in *Mills* other than in the very limited context of whether the duty alleged would be inconsistent with other duties owed by the liquidator. It is not surprising, therefore, that the Full Court did not consider the decision in *Spies* and the other authorities concerning whether an officer of a company owes fiduciary duties to individual creditors or contributories.

The acceptance by this court of a possible duty of care in *Mills* was fact specific. Relevantly, there was a coincidence of interest between the plaintiffs as indemnifiers and the company as the beneficiary of the indemnity. The identification of a common law duty of care involves different factors and policy considerations to the recognition of the fiduciary relationship. The decision in *Mills* cannot be taken as authority for the proposition that a liquidator owes a fiduciary duty to individual creditors. The imposition of such a duty would be inconsistent with the general law relating to company officers and insolvency administration.

As to the position of administrators, Barrett J stated in *Hausmann v Smith* [[2006] NSWSC 682; (2006) 24 ACLC 688 at [12]]:

The second point is that the duties owed by administrators and liquidators are not duties owed to shareholders or to creditors. Reference was made to *Russell Kinsela Pty Ltd (In liq) v Kinsela* [1983] 2 NSWLR 452. That case is part of a line of decisions the most recent authoritative element of which is, I think, *Spies v The Queen* (2000) 201 CLR 603 in which it is recognised that directors' duties are owed to the company, even though due performance of those duties may require directors to pay attention to the interests of creditors. There is a difference between the beneficiary of a duty and the delineation of the interests to be taken account of in performing the duty. In my opinion, the same analysis holds good in relation to the duties of administrators and liquidators.

We agree with those observations. In our view, Mr Macks did not owe a duty to Mr Viscariello in the conduct of the administration that was enforceable by Mr Viscariello under the general law. The recognition of such a duty would be inimical to the basic principles and policies on which insolvency administration rest — in particular, the principle of equality between creditors.

- 35 The Full Court also commented on the primary judge's statement that Mr Macks, as an administrator, owed a fiduciary duty to disclose all material

information to the companies' creditors. At [213], the Court held that while an administrator is required to perform the statutory duties or requirements that are prescribed by Pt 5.3A of the CA, those duties or requirements are not fiduciary in nature. The CA confers various powers on administrators to enable their duties or requirements to be performed, and the administrator's fiduciary duties, as an officer of the company under administration, operate as a constraint in exercising those powers and performing his or her statutory function.

36 As to whether the statements made by Mr Macks to Mr Viscariello and other creditors were made "in trade or commerce", the Full Court adopted the observations of Barrett J (as his Honour then was) in *New Cap Reinsurance Corporation Ltd v Daya* [2008] NSWSC 64; (2008) 216 FLR 126, and held that there was no commercial exchange or trade between Mr Macks and the companies, their shareholders or creditors. Their Honours quoted Barrett J's remarks in *New Cap* to the effect that the relationship between a voluntary administrator, the company, the contributors and the creditors is a statutory construct (see at [233]-[234]).

37 At [283], the Full Court noted that the primary judge had accepted that the power conferred by s 447E of the CA extended to making a compensation order and that, it would seem, such an order could be made in favour of an individual creditor as a person aggrieved. Although it was not necessary to resolve this issue on appeal, their Honours suggested that it was doubtful that s 447E conferred a power on the court to order compensation in favour of an individual creditor, such an interpretation being inconsistent with the principles underpinning the operation of Pt 5.3A of the CA, especially the principle of equality of creditors.³²

38 As to Mr Macks' appeal, the Full Court noted (at [363]) that the essence of the appeal was a challenge to the primary judge's findings that Mr Macks, as at the end of June 2005, acted unreasonably and with a collateral and unlawful

³² *Macks* at [283].

purpose(s) (this having led the judge to find that Mr Macks breached ss 180, 181, and 182 of the CA).

- 39 In relation to s 180 of the CA, the Court re-emphasised the well-established principles that the standard imposed by s 180 is an objective one, requiring consideration of the particular circumstances of the company to which the duty is owed by the liquidator as an “officer” of the company and of the office and responsibilities within the corporation as the liquidator.³³ Citing *ASIC v Rich*, the Court stressed that while liquidators, appointed and paid to exercise professional duties, must meet high standards of skill and competence in the performance of those duties, conduct that is found to be a mere error of judgment does not contravene the statutory standard under s 180(1).³⁴ In the result, the Full Court found that the primary judge was in error in failing to give proper weight to the advice proffered by Minter Ellison to Mr Macks in relation to the Bernstein proceedings and the George strategy and proceedings (particularly since it had not been put to any of the Minter Ellison witnesses that this advice was negligent or improper).³⁵ The Court also found that the primary judge had failed to take relevant matters into account and, alternatively, that his reasons for any breach of s 180(1) as from June 2005 were inadequate.³⁶
- 40 However, the Full Court had then to determine for itself whether Mr Macks had breached s 180 of the CA at a time later than June 2005. It emphasised that a liquidator “should not pursue litigation simply in order to generate fees without any view to the interests of the creditors or the public interest”.³⁷ The Court found that Mr Macks effectively lost control of the George proceedings after April 2006, at a time when his legal advisors made clear to him that there was no benefit to creditors in continuing to pursue the litigation, and that continuing vigorously to pursue the Bernstein action and the George

³³ Ibid [420], citing *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465 at [18]; *Asdin Developments Pty Ltd (In liq) v Dinoris* [2017] FCAFC 117.

³⁴ *Macks* at [421]-[422]; *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1 at [7242] per Austin J.

³⁵ *Macks* at [493].

³⁶ Ibid [526]; and see [543]-[547].

³⁷ Ibid [509].

proceedings from April 2006 was unreasonable and showed a failure to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable liquidator would have exercised in the company's circumstances.³⁸ The Court found later in its judgment (for reasons which, although interesting, I do not have space here to discuss) that Mr Viscariello did have standing to seek declaratory relief and that the Court could exercise its jurisdiction conferred by s 31 of the *Supreme Court Act 1934* (SA) to declare that a company officer had breached a statutory duty imposed by the CA. Accordingly, it made a declaration of breach of s 180(1) of the CA as from April 2006.³⁹

- 41 In relation to the findings that Mr Macks was actuated by collateral purposes, including at least one purpose that was improper, the Full Court emphasised that the *Briginshaw* principle had to be applied in making such findings, and that accordingly it was necessary for the evidence to support a definite inference, not merely conflicting inferences of equal degree of probability.⁴⁰ The Full Court set aside the finding that as at June 2005 Mr Macks was actuated by four substantial and actuating purposes (identified at [757] of the primary judgment). It summarised the relevant principles in this regard (equally applicable to the company liquidator) at [612] (with respect to s 181) and [616] (with respect to s 182) and noted that there was no evidence in the reasons of the primary judge that he undertook any of the required analysis and held that, to that extent, the reasons in respect of ss 181 and 182 were inadequate.⁴¹
- 42 The Court held that there was insufficient evidence on appeal to find that Mr Macks acted with an improper collateral purpose from April 2006, and hence that it was not in a position separately to address this question.⁴² Having noted that, in the ordinary case, both parties would be entitled to a retrial to have the matter reheard in respect of these issues, the Court found that

³⁸ *Macks* at [559]-[562].

³⁹ *Ibid* [562].

⁴⁰ *Ibid* [599].

⁴¹ *Ibid* [610]-[621].

⁴² *Ibid* [627].

there were a number of matters which militated against remitting the issues of declarations for breaches of ss 181 and 182 for a further trial and, accordingly, did not do so.⁴³

- 43 In summary, the Full Court's decision largely upheld Mr Macks' appeal, although still finding breaches of s 180 in relation to the continuation of legal proceedings. The case provides critical guidance on the duties of administrators and liquidators, and the interaction between their statutory obligations under the CA and other sources of obligations (including fiduciary duties, fair trading legislation prohibiting misleading or deceptive conduct, and other general law obligations).

Third party payments as unfair preferences: *Hosking v Extend N Build*

- 44 The third decision to which I wish to draw your attention is *Hosking v Extend N Build Pty Ltd* [2018] NSWCA 149. In this decision, the NSW Court of Appeal considered whether payments made by a third party could be recovered by the liquidator of the insolvent company as unfair preferences. The Court of Appeal unanimously dismissed the appeal as against the first to fifth respondents, and allowed the appeal in respect of the sixth respondent.⁴⁴

- 45 In September 2012, a building company, Evolvebuilt Contracting Pty Ltd, entered into an agreement with a principal contractor, Built NSW Pty Ltd, to carry out building work on a site in Pitt Street. Less than six months after the engagement, Evolvebuilt ceased operations, leaving unpaid the subcontractors that it had retained to carry out the work.⁴⁵

- 46 The CFMEU wrote directly to Built NSW, the head contractor, to demand that it make good Evolvebuilt's debts and pay the subcontractors directly. Separately, Evolvebuilt also wrote to Built NSW requesting that it pay the

⁴³ Ibid [807]-[816].

⁴⁴ The leading judgment was delivered by Bathurst CJ, with whom Beazley P (at [123]) and Gleeson JA (at [124]) agreed.

⁴⁵ *Hosking* at [6]-[8] per Bathurst CJ.

unpaid subcontractors on its behalf (relying on a provision of the head contract in this regard).⁴⁶

47 Subsequently, Built NSW terminated the contract with Evolvebuilt. Built NSW then contacted the CFMEU, outlining an arrangement for the payment of the outstanding amounts to the subcontractors; those payments were subsequently made.⁴⁷ The first to fifth respondents were subcontractors paid by Built NSW. The sixth respondent, Kennico Interiors Pty Ltd, is in a different position in that no payments were made to Kennico by Built NSW; rather, Evolvebuilt itself made payments to Kennico.⁴⁸

48 Liquidators were appointed to Evolvebuilt, and they commenced proceedings against the subcontractors to recover the amounts paid directly to them by Built NSW (and, in the case of Kennico, by Evolvebuilt) as unfair preferences.

49 The primary judge found that Evolvebuilt was insolvent at the time that the payments were made, and there was no challenge to that finding on appeal.⁴⁹ However, the primary judge rejected the claims against the first to fifth respondents on the basis that the payments did not constitute “unfair preferences” within the meaning of s 588FA(1) of the CA. His Honour found that the payments made to the sixth respondent, Kennico Interiors Pty Ltd, were “unfair preferences” within the meaning of s 588FA(1), but held that Kennico was entitled to rely on the defence contained in s 588FG(2) of the CA.⁵⁰ It is useful at this stage to set out these subsections:

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

⁴⁶ Ibid at [10]-[11].

⁴⁷ Ibid at [12], [15].

⁴⁸ Ibid at [13]-[14].

⁴⁹ Ibid at [19].

⁵⁰ Ibid at [2].

the debt if 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.

588FG Transaction not voidable as against certain persons

- ...
- (2) A court is not to make under section 588FF an order materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company, or an unreasonable director-related transaction of the company, and if it is proved that:
- (a) the person became a party to the transaction in good faith; and
 - (b) at the time when the person became such a party:
 - (i) 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
 - (ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and
 - (c) the person has provided valuable consideration under the transaction or has changed his, her or its position in reliance on the transaction.

50 Section 588FF empowers a court to make certain orders in relation to “voidable transactions”, and s 588FE(2) states that a transaction is voidable if it is an “insolvent transaction” made during a particular period, and s 588FC states that a transaction is an “insolvent transaction” if it is an “unfair preference” within the meaning of s 588FA(1) and was entered into while the company was insolvent.

51 On appeal, the appellants asserted, first, that the primary judge erred in construing s 588FA(1) of the CA in finding that the payments made by Built NSW to the first to fifth respondents on behalf of Evolvebuilt were not received “from the company”. So far as Kennico was concerned, the appellants contended that the primary judge erred in concluding that the defence in s 588FG(2) of the CA was available when Kennico was aware that Evolvebuilt “had no money to pay subcontractors”.⁵¹

52 As to the s 588FA(1) issues, Bathurst CJ emphasised that since the section requires a debtor company and a creditor to be “parties to the transaction” which is alleged to be voidable, it is important to identify the relevant “transaction” in question. The “transaction” may be a series of interrelated

⁵¹ Ibid at [62]-[64].

dealings, and the debtor company and the creditor need not be a party to each part (his Honour referring in this regard to the decision of the Full Federal Court in *Re Emanuel (No 14) Pty Ltd (in liq)* (1997) 147 ALR 281 (“*Re Emanuel*”).⁵² The Chief Justice summarised *Re Emanuel* (at [23]) as authority for two “unsurprising” propositions:

First, an agreement for consideration between a debtor company and a third party by which the third party is required to pay funds to a creditor of the debtor company and does so pursuant to a direction by the debtor company can constitute a “transaction” within the meaning of that expression under s 9 of the Act. Second, a payment to the creditor pursuant to a direction of the debtor company with which a third party is contractually bound to comply is a payment “from” the debtor company for the purpose of s 588FA(1)(b) of the Act.

- 53 Applying that reasoning, if it could be established that, as a result of an (express or inferred) arrangement between Evolvebuilt and Built NSW, Built NSW reached an arrangement with Evolvebuilt and its creditors, being the first to fifth respondents, pursuant to which those creditors were paid, that would constitute a relevant transaction for the purposes of s 588FA(1)(a).⁵³ The appellants contended that both the request from Evolvebuilt to Built NSW as well as the request or demand by the CFMEU on the same day were part of a “chain of causation” which resulted in the payments to the respondents by Built NSW.⁵⁴ Addressing that submission, Bathurst CJ said (at [94]):

It does not seem to me to be helpful in this context to refer to a “chain of causation”. What is necessary for the purposes of s 588FA(1)(a) is to identify the “transaction” and determine whether Evolvebuilt was a party to it. If the transaction resulted from the contractual arrangements which existed between Built and Evolvebuilt, then I would accept, on the undisputed assumption that the first to fifth respondents would have been parties to such a transaction, that the transaction would fall within s 588FA(1)(a).

- 54 On the facts, Bathurst CJ found that the appellants had not established that Evolvebuilt was a party to the “transaction” as a result of which the payments were made by Built NSW.⁵⁵ His Honour held that the evidence did not establish that the discussions between Built NSW and Evolvebuilt, following

⁵² Ibid at [91]-[93].

⁵³ Ibid at [92].

⁵⁴ Ibid at [93].

⁵⁵ Ibid at [95]ff.

the letter from the CFMEU to Built NSW on the same day, formed any part of a “composite” transaction by which the first to fifth respondents’ debts were paid.⁵⁶

55 The Court of Appeal left unresolved whether a creditor receives “from the company” a payment in respect of an unsecured debt for the purposes of s 588FA(1)(b) where, as part of a “transaction”, the payment is received from a third party and the debtor company authorised or acquiesced in the payment being made on its behalf so as to give rise to a “restitutionary” claim against it in favour of the third party. However, Bathurst CJ expressed the tentative view that, if the “restitutionary” claim resulted from a “transaction” to which the debtor company was a party, then the payment could be said to have been received “from the company” (this being consistent with the reasoning of Gordon J in *Burness v Supaproducts Pty Ltd* [2009] FCA 893; (2009) 259 ALR 339 at [46]-[47]). The Court also considered it unnecessary to determine the question left open by the Full Court of the Federal Court in *Federal Commissioner of Taxation v Kassem* (2012) 205 FCR 156; [2012] FCAFC 124 (at [59]), as to whether it is necessary for there to be a diminution in the debtor company’s assets for a transaction to constitute an “unfair preference” under s 588FA(1).⁵⁷

56 As to the appeal against the dismissal of the claim against Kennico, both parties accepted that the relevant principles as to s 588FG(2)(b)(ii) were those set out by Black J in *Re Alsafe Security Products Pty Ltd (in liq)* [2016] NSWSC 428.⁵⁸ The Court of Appeal concluded that the evidence led to the conclusion that a reasonable person in the position of a director of Kennico would have had a “positive feeling of apprehension or mistrust” that Evolvebuilt would be able to pay its debts at the time that the payments to Kennico were made.

⁵⁶ *Ibid* at [108].

⁵⁷ *Ibid* at [111].

⁵⁸ *Ibid* at [115].

Concluding remarks

- 57 If there is a connecting thread between these three decisions, it is perhaps that careful attention needs to be paid in each case to the precise terms of the relevant statutory provisions.
- 58 *Sakr Nominees* is a decisive and authoritative judgment which may be said to restore clarity to the question of how liquidators' remuneration is to be calculated and assessed, by refocussing attention on the inquiry mandated by the statutory provisions.
- 59 *Macks v Viscariello* clarifies the duties imposed on administrators with respect to their reporting obligations to creditors, as well as whether, when performing statutory obligations as administrators, they are acting "in trade or commerce" so as to fall within the misleading or deceptive conduct statutory prohibitions. The affirmation – by an intermediate appellate court – that the relationship between the administrator and the company's stakeholders is not a commercial exchange but a statutory construct is important and again, refocusses attention on the mechanisms for statutory review under the CA. Moreover, the explanation of the scope of the administrator's fiduciary role is significant for insolvency practitioners, as is the consideration of direct duties to individual creditors. We also take from this comprehensive decision a reminder of liquidators' duties when engaging in liquidation. What also emerged from the appeal was the need for careful consideration of each individual statutory duty imposed by, respectively, ss 180, 181, and 182; for consideration of the different authorities and requirements of each; and for adequate reasoning by trial judges in making findings of breaches of these provisions.
- 60 Finally, *Hosking v Extend N Build* is a clear reminder of the essential statutory elements which need to be satisfied in order to recover payments made by a third party as unfair preferences, while leaving some interesting questions in this context for another day.
