HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S119/2023
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **JOHN MAXWELL MORGAN**
First Appellant
SYDNEY ALLEN PRINTERS PTY LTD (IN LIQUIDATION)
Second Appellant
SYDNEY ALLEN MANUFACTURING PTY LTD (IN LIQUIDATION)
Third Appellant
and
MCMILLAN INVESTMENT HOLDINGS PTY LTD
First Respondent
AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: The first respondent certifies that this outline is in a form suitable for publication on the internet.

Part II: An outline of the propositions to be advanced in oral argument.

1. Section 579E(1)(iv) of the Act requires the identification of presently owned '*particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, scheme, or an undertaking, carried on jointly by the companies in the group'* before a pooling order can be made because that state of affairs is a pre-condition to exercise the discretion to make a pooling order (Yates J at **FC [67], [70], [71]-[74] CAB 59-60**) and Beach J at [**138], [140]- [148] CAB 72-74**).

2. The appellants' various descriptions of the relevant "*particular property*" (chose in action) are elusive and elastic (**RS [4], RFM (30-32).** The "*particular property*" appears, but not straightforwardly, to be a claim by SAP and SAM for an unpaid portion of the

purchase price, notwithstanding contrary assertions from time to time **(RFM (30-32)** and that no claim has ever been asserted against the purchaser. Alternatively, the claim appears to be for some kind of misconduct against the directors of the first respondent, as alleged officers of SAP and SAM (**RFM 30-32**).

3. Surplus proceeds from the sale of a business carried on jointly cannot be '*particular property*' (**RS [14]**). By definition, the proceeds or part of the proceeds of the sale of a business, let alone claims for them, could never have been used or for use in connection with that very business (**FC [138] CAB 72**).

4. Section 493 *Corporations Act* requires the company to cease carrying on business, except so far as in the liquidator's opinion a continuation of the business is required for the beneficial disposal or winding up of that business. Sale as a going concern of a business is an obvious kind of beneficial disposal. Getting in the balance of a purchase price arising from such a sale is an obvious aspect of the liquidator winding up the affairs of the company (as opposed to winding up the business that has been sold). A chose in action to enforce full payment of such a purchase price cannot be said to be property that is or was used or for use in the subject matter of that sale, namely the business carried on jointly by the now separately liquidated companies.

5. One version of the alleged chose arose upon completion of the sale of the printing business of SAP and SAM on 1 July 2016 (**RS [2], FC [148] (CAB 74)**). If its essence were seen as compensation for some kind of misconduct, by definition it came into existence only by reason of the sale of the business and thus cannot ever have been used or for use in connection with the business which was the subject of the sale. Another version of the alleged chose might be speculated as arising when the sale price was agreed in the figure eventually paid upon completion and that version comprises a claim against the persons supposedly involved in procuring a sale at that price rather than a higher price. Yet another speculative version is a claim against MGS who received $300K (plus GST) allegedly "diverted" by reducing the sale price of the business what would supposedly otherwise have been agreed. All of these possibilities or variants of them, depend upon the business in question being sold by way of disposal in the liquidation/receivership. The assorted complaints arising from them are by definition not the basis for any chose in action that was itself used or for use in the very business that was sold (Yates J at **FC [67], [70], [71]-[74] (CAB 59-60**) and Beach J at [**138], [140]-[148] CAB 72-74**).

6. At the time the business was sold, both SAP and SAM were in liquidation which, absent pooling, necessarily were required to be conducted on a stand-alone specific entity basis (**RS [9], [11]**) (**FC [142] CAB 73**). The fact that SAP and SAM jointly sold their printing business when they were both in liquidation did not make their liquidations joint. They were separate and were required to be conducted separately, not jointly (**RS [11]**).

7. The FCAFC majority correctly found (**RS [9]-[16], [19]- [24], FC [72] and [74] (CAB 60**), **FC [147] (CAB 73-74)**) there was no evidence of anything, let alone a business, "*carried on jointly*" by SAM and SAP after 1 July 2016. Further, after 1 July 2016, SAM and its liquidators did nothing until deregistered by ASIC in June 2018 at the request of SAM's liquidators (**RS [12], FC [147] (CAB 73-74); RS [18] FC [120] CAB 69-70).**

8. Resort by the FCAFC minority (Markovic J **FC [243]-[244] CAB 98-99**) to s43(1)(b)(iii) *Bankruptcy Act* cases concerning whether an individual was "*carrying on business in Australia*" to enliven the court's jurisdiction to make a sequestration order over that individual is not apposite. Getting in and paying debts is an incident of the winding up process and involved no more than the liquidators performing their statutory functions, powers and duties. Note that section 21(3) *Corporations Act*, a partially cognate provision to s43(1)(b)(iii) *Bankruptcy Act*, excludes the collecting of debts (among other forms of commercial conduct) as enough to locate a business as one carried on in Australia.

9. The retrospective s601AH(5) statutory fiction arising upon reinstatement cannot be understood to have invented conduct that never in fact occurred (**RS [16], FC [147] (CAB 73-74).**

10. The first respondent is not required to file a notice of contention. In this regard, the first respondent adopts the approaches of the FCAFC majority (Yates J at **[30] – [35] CAB 52-53, [76] CAB 60** and Beach J at **[135], [138] CAB 72**).

11 June 2024

Bret Walker

Counsel for the first respondent