HIGH COURT OF AUSTRALIA

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Details of Filing

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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

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Internet Publication

These submissions are in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

1. A conclusion that the conditions in s579E(1)(iv) (**Part A 117**) were satisfied as at 2 December 2021 is available because:

   (a) SAP and/or SAM owned "particular property" being the chose in action to recover the difference between the contract sale price for their printing business and the price that would have been received had that difference (they allege) not been wrongfully diverted no later than 5 May 2016;

   (b) that "particular property" met the requirement that it be used or be for use by SAP and/or SAM; and

   (c) that use was (and is) "in connection with" the printing business "carried on jointly" by SAP and SAM.

2. Section 579E(1)(iv) only requires that the last element be joint (*Re Lombe* [2011] NSWSC 1536 at [69] **Part D 314**); it is sufficient if either SAP or SAM (or both) satisfy the other two.

3. Whether the conditions are satisfied is to be determined at the date the pooling order is made (*Lombe* at [40] **Part D 308**).

4. Although there is overlap, the reasoning supporting the majority's conclusions are not identical (and will be addressed separately). There is, however, common error in that reasoning in relation to the second and third elements, being to treat SAP and SAM's activities after the sale of the printing business as a new or separate undertaking.

5. More generally, the reasons of the majority, if correct, will significantly curtail the availability of pooling.

Particular property – Ground 2(b) AS[11]-[14] and Ground 2(c) AS[29]-[36]

6. As to the first element:

   (a) a chose in action is capable of being particular property for the purposes of sub-section (iv). That property can be used by being held if doing so entails some advantage;

   (b) each of the causes of action asserted by SAP and SAM (Yates J at [33]-[35] **CAB 53**; Markovic J at [226] **CAB 94**) was complete no later than 5 May 2016 (being the day that Print Warehouse paid $330,000 to MGS; cf Beach J at [148] **CAB 74**); AS[11]-[12]. On

that date SAM was in liquidation (7 April 2016) but SAP was not (13 May 2016); AR[7]-[8]; S119/2023

(c) as at 5 May 2016, the printing business operated jointly by SAP and SAM was still trading (it was sold as a going concern and the transaction did not complete until 1 July 2016; **RFM 5**);

(d) it is neither useful nor possible for this Court to calibrate the strength or weakness of the claims presently being litigated in the Supreme Court; AR[1]-[2], [6].

7. SAM was reinstated prior to the pooling order being made. The length of time between that fact and the making of the pooling order is of no consequence, provided that reinstatement occurred first.

8. As at reinstatement, the chose in action revested in SAM by reason of s601AH(5); AS[29]. It follows that when the pooling order was made the chose in action was being used and for use by both SAP and SAM (though use by either would be sufficient); AR[17]-[18].

Use or for use – Ground 2(a) AS[15]-[29]

9. As to the second element:

(a) the primary judge concluded that it "was plain as a pikestaff" that the affairs of SAP and SAM were intermingled (at [101] **CAB 35**) and "[a]s a pooling order would only advantage creditors of both companies, the case for a pooling order is compelling" (at [104] **CAB 35**). Those conclusions were not disturbed in the Full Court (Markovic J at [194]-[195] **CAB 86**) so that only the "gateway" condition remains in issue;

(b) that condition directs attention to use that is present or past ("is or was") or available in the present or past ("for use"). Past use was not relied on by the appellants (PJ[97] **CAB 34**, Yates J at [67] **CAB 59**, Markovic J at [241] **CAB 98**): AS[10(b)], [14];

(c) however, the effect of the reasons of Beach J at [142]-[146] **CAB 73** is that condition could never be satisfied if present use is relied on. That is so because of his Honour's conclusion (at [142] and [148] **CAB 73, 74**) that, as the liquidations of SAP and SAM were required to be conducted separately, there "could be no alleged joint undertaking jointly carried on by SAP and SAM";

(d) that conclusion is wrong. It finds no support in the Act or authority. It requires correction, not only because of its effect on the availability of pooling (Markovic J at [249] **CAB 100**); AS[25]-[28]) but also because of its wider implication in liquidations generally (for

example, it would constrain the power of a liquidator provided by s477(1)(a) to carry on the business of a company only to a business not conducted with another entity). There is no inconsistency, or question of primacy, between that provision and s493: **Part A 104, 109**, AR[9]-[10],[13];

(e) the reasoning of the majority (and particularly Yates J at [70] **CAB 59**) is also problematic to the extent it describes the chose in action as a "future joint undertaking." The primary judge's reference to future use was explained by Markovic J at [250] **CAB 100**. The chose in action is also available for use (Beach J at [146] **CAB 73**). That does not have the effect that it was not being used (or for use) by being held until the suit was or could be brought;

(f) finally, it is not necessary that the printing business continues to trade, only that the chose in action be in connection with a business that is or has been carried on (Yates J at [62] **CAB 58**; *Lombe* at [35] **Part D 308**).

Use "in connection with" the printing business – Ground 2(a) AS 19-24

10. As to the third element:

(a) the reasoning of the majority was in error in focussing on SAP and SAM's activities in liquidation as being a separate and distinct business from the printing business conducted jointly by them, which in turn led to error in the finding that there was a lack of evidence supporting that new business (Beach J at [147] **CAB 73**, Yates J at [74] **CAB 60**). If the printing business is considered as a whole then the chose in action is in connection with that business (Markovic J at [249] **CAB 100**; AS[19]-[24]);

(b) the getting in of debts and payments to creditors is a continuation of business, albeit in a different form; AS[19]. Markovic J was correct (at [242]-[245] **CAB 98**) to have regard to bankruptcy cases. Although Yates J at [65] **CAB 58** noted the use of the words "in connection with" extends "use" to incidental or ancillary activities of the business, the reasons of the majority narrow the scope of that provision (in that context it may be observed that "carrying on" is wider in s579E(1)(iv) than the similar words in s43(1)(b)(iii) of the *Bankruptcy Act 1966*; **Part B 143**). Here the position is stronger because what the appellants are pursuing is not trading debts but funds the appellants say should have formed part of the purchase price but did not.

Dated: 11 June 2024

M R PESMAN