11/11; [2011] VSC 195

SUPREME COURT OF VICTORIA

METCALF CRANE SERVICES PTY LTD v RATHNER

Robson J

27 April, 10 May 2011

CORPORATIONS – INSOLVENCY – UNFAIR PREFERENCE – DEFENCE UNDER S588FG(2) – EXISTENCE OF REASONABLE GROUNDS FOR SUSPECTING THAT THE COMPANY WAS INSOLVENT - MAGISTRATE CONCLUDED DEFENCE NOT MADE OUT – WHETHER MAGISTRATE IN ERROR: *CORPORATIONS ACT* 2001, S588FG.

APPEAL TO THE SUPREME COURT ON QUESTION OF LAW – CONSIDERATION OF NATURE OF APPEAL ON QUESTION OF LAW WHERE FACTUAL FINDINGS CHALLENGED – QUESTION OF LAW IS WHETHER THE CONCLUSION OF THE MAGISTRATE WAS REASONABLY OPEN ON THE EVIDENCE: *MAGISTRATES' COURT ACT* 1989, S109; *SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES* 2005, RULE 58.06.

MC supplied crane services to a construction company CCGV and rendered an invoice. When the invoice was not paid, MC took action to recover the amount plus costs. At a pre-hearing conference in August 2008, terms of settlement were signed between the parties whereby CCGV agreed to pay a certain sum plus costs. In November 2008 CCGV was ordered to be wound up by the Federal Court and R. was appointed liquidator. R. then claimed from MC that the payment made to them by CCGV was an unfair preference and should be paid back to CCGV. MC refused and R. took proceedings in the Magistrates' Court. The Magistrate upheld R.'s claim and ordered that MC pay CCGV (in liquidation) a certain sum plus costs. The Magistrate upheld the claim stating that he was not satisfied that MC had proved that it, and a reasonable person in its circumstances, had no reasonable grounds for suspecting that CCGV was insolvent at the relevant time. On appeal—

HELD: Appeal dismissed.

1. After taking in account the authorities referred to and the question of law raised and the ground of appeal alleged, to successfully appeal under s109 of the *Magistrates' Court Act* 1989, the appellant must satisfy the Court that it was not reasonably open on the evidence for the magistrate to conclude that MC had not proved both of the elements of the statutory defence in sub-s2(b) of s588FG of the *Corporations Act* 2001 ('Act'). The point of law was whether the conclusion of the magistrate was reasonably open on the evidence.

2. There was no dispute that CCGV was insolvent at the time of the payments to MC and that they were unfair preferences within the meaning of s588FA of the Act and accordingly were insolvent transactions within s588FC. The court's power to make orders, including repayment under s588F, was established.

3. MC bore the onus of establishing the statutory defence under s588FG(2) of the Act. The central issue before the magistrate was whether or not MC had proved the matters referred to in sub-s(2)(b).

4. The conduct of CCGV raised the inference that CCGV may have been unable to pay its debts as they fell due and that CCGV's conduct in resisting MC's just claim was evidence of that inability.

5. The conduct of CCGV may well have been consistent with a desire to delay payment. But the issue before the magistrate was whether MC had proved that they had no reasonable grounds for suspecting CCGV was insolvent at that time and a reasonable person in MC's position would have no such grounds for suspecting. Suspecting involves more than idle wondering and must be a positive feeling of actual apprehension or mistrust without sufficient evidence. Suspecting is a state of mind that may not be evidenced by any outward conduct on the part of the person suspecting. In such cases it is a question of inference from the information available to that person whether or not the person relevantly suspects.

6. The relevant statutory test asks whether MC proved that it, and a reasonable person in its circumstances, had no reasonable grounds for suspecting that the company was insolvent. A Court should not consider the evidence with the benefit of hindsight and should consider the cumulative impact of the relevant evidence both for and against establishing absence of the relevant suspicion. The mere failure to pay debts on time does not by itself constitute grounds for suspecting insolvency.

7. The evidence before the Magistrate left reasonably open the conclusion that MC had not proved

that it, and a reasonable person in its circumstances, had no reasonable grounds for suspecting (being a state of mind in the relevant sense) that CCGV was insolvent when the settlement was reached. Accordingly, the appeal was dismissed with costs.

ROBSON J:

INTRODUCTION

1. The appellant, Metcalf Crane Services Pty Ltd ("Metcalf Cranes"), appeals, under s109 of the *Magistrates' Court Act* 1989, against orders made on 1 June 2010 in the Magistrates' Court in proceedings[1] between Gideon Rathner (as liquidator of Consolidated Construction Group (Victoria) Pty Ltd ("CCGV") (in liquidation) and CCGV (in liquidation) as plaintiffs and Metcalf Cranes as defendant, that Metcalf Crane pay CCGV (in liquidation) the sum of $55,250.75 together with interest in the sum of $4,829.52 after 30 days, and it pay the plaintiffs' costs.

2. In substance the issue arose as follows. Whilst insolvent, CCGV, a construction company, had discharged a debt to Metcalf Cranes incurred for the supply of crane services. The liquidator of CCGV claimed the transaction was a voidable transaction as an unfair preference and sought repayment under s588FF of the *Corporations Act* 2001. The defendant raised the statutory defence to the claim under s588FG. The magistrate held he was not satisfied that Metcalf Cranes had proved that it, and a reasonable person it its circumstances, had no reasonable grounds for suspecting that CCGV was insolvent at the relevant time. Metcalf Cranes appeals that decision under s109 of the *Magistrates' Court Act* 1989.

3. For the following reasons, I dismiss the appeal with costs.

THE FACTS

4. Metcalf Crane carries on business as the supplier of crane services and has done so for about fourteen years. Mr Metcalf is the sole director of Metcalf Cranes. CCGV was a builder building a block of apartments in Mount Street, Dandenong.

5. On 10 August 2007, CCGV gave to Metcalf Cranes an executed credit account application and guarantees from its directors Mr Craig Dor and Mr John Atkinson. From 11 February 2008 to 3 March 2008, Metcalf Cranes provided crane hire services to CCGV at their construction site in Heidelberg. The crane work involved lifting building panels and other building materials.

6. On 3 March 2008, Metcalf Cranes rendered its final invoice to CCGV for the work it had done, which totalled $55,250.75. On the next day, Metcalf Cranes removed its crane from the site and moved it to another job. CCGV required further cranage services at the site some two weeks later. Metcalf Cranes was asked to provide those services. Mr Metcalf in conversations with representatives of CCGV informed CCGV that Metcalf Cranes would not provide the services as it had not been paid for the work done to date. Mr Metcalf was informed by representatives of CCGV that it had been paid by its principal for the work done by Metcalf Cranes and that Metcalf Cranes would be paid soon.

7. Shortly prior to 21 April 2008, Metcalf Cranes retained its solicitor to take steps to recover the outstanding moneys. On 21 April 2008, Metcalf Crane's solicitor conducted a company search of CCGV. On 22 April 2008, Metcalf Crane's solicitor sent a letter of demand to CCGV for the unpaid invoices. The letter stated:

> We act on behalf of Metcalf Crane Services Pty Ltd and note that there is an indebtedness to our client of $55,250.75 in relation to two jobs, one at Mount Street Heidelberg and one at Orient Place Heidelberg. The works were undertaken in February and March 2008 and there seems no reason at all why the balance of $55,250.70 should not now have been paid.
>
> We note that there are guarantees given by Mr Craig Dor and Mr John Atkinson and we note that if payment is not made immediately by the company then these guarantees will be called up and proceedings issued against the company and the two guarantors seeking payment of the amount jointly and severally pursuant to the Terms of the Guarantee.

8. On 28 April 2008, CCGV's solicitor responded and proposed payment of the outstanding amount by instalments. The instalment plan proposed, in part:

> [CCGV] pays to your client the present undertakings, without right to set off as follows:-
> (a) the sum of $11.050.15 on or before 5pm Monday, 30 June 2008;
> (b) the sum of $11.050.15 on or before 5pm Thursday, 31 July 2008;
> (c) the sum of $11.050.15 on or before 5pm Friday, 29 August 2008;
> (d) the sum of $11.050.15 on or before 5pm Thursday, 30 September 2008;
> (e) the sum of $11.050.15 on or before 5pm Friday, 31 October 2008.

9. On 1 May 2008, Metcalf Crane's solicitor wrote to CCGV rejecting the proposal stating, in part:

> We refer to your letter of 28 April 2008 and note that our client is not interested in the instalment proposal put by you. Our clients' understanding is that your client has been paid for the work done by our client and there is no reason at all why our client should not be immediately paid in full for that work.

10. On 12 May 2008, Metcalf Crane issued proceedings in the Magistrates' Court against the CCGV and its directors as guarantors claiming payment of the outstanding debt. ("the first Magistrates' Court proceeding").

11. On 21 May 2008, CCGV solicitor acknowledged receipt of the complaint and requested a 'stand still'. On 29 May 2008, Metcalf Cranes served the complaint on CCGV's guarantors, Messrs Dor and Atkinson.

12. On 4 June 2008, a winding up application was commenced against CCGV in the Federal Court of Australia.

13. On 10 June 2008, CCGV and Messrs Dor and Atkinson filed a defence. The defence did not raise any substantive defence to the claim but merely denied the claims.

14. On 26 June 2008, Metcalf Cranes failed in its application for a default judgment against the defendants. On 24 July 2008, CCGV and its directors served a notice disputing documents.

15. On 4 August 2008, a pre-hearing conference was held and terms of settlement were signed between Metcalf Cranes and Messrs Dor and Atkinson. Those terms, in part, stated:

> ...
> 3. In consideration of the Plaintiff's forbearance to seek judgment this day, the Second and/or Third Defendant hereby offers to pay to the Plaintiff the sum of $62,000 in full satisfaction of the claim, interest and costs. The agreed sum is the amount of the claim, plus costs fixed in the sum of $6,749.25.
> 4. The Plaintiff agrees to accept the agreed sum in lieu of seeking judgment provided the sum is received by 4pm, Friday 5 September 2008.

16. On 6 August 2008, and again on 2 September 2008, Metcalf Crane's solicitor sent a reminder letter to CCGV of the settlement payment due by the directors.

17. On 4 or 5 September 2008, CCGV made a payment to Metcalf Cranes of $62,000 pursuant to the terms of the settlement. On 19 September 2008, the first Magistrates' Court proceeding was discontinued.

18. On 27 November 2008, CCGV was ordered to be wound up by the Federal Court of Australia and Gideon Rathner was appointed liquidator.

19. On 17 July 2009, the liquidator wrote to Metcalf Cranes claiming that the payment by CCGV to Metcalf Cranes was an unfair preference, stating:

> In my opinion, a Court would make an order under s588FF(1)(a) of the *Corporations Act 2001* directing you to pay to the Company the sum of $62,000 ("the Order"), being an amount equal to the money paid by the Company to you as the Court would be satisfied of the following matters:
>
> (a) the Transaction was an insolvent transaction within the meaning of s588FE of the *Corporations Act* 2001 because at the time of the Transaction the Company was or became insolvent;

(b) the Transaction is an unfair preference within the meaning of s588FA of the *Corporations Act* 2001 as it resulted in you receiving more money from the Company than you would receive if it proved for the debt in the winding up of the Company; and

(c) the Transaction was entered into on a date within 6 months prior to the relation-back date and the day of the winding up of the Company. (The relation-back date is the date of the petition to wind-up the Company was filed being 4 June 2008. The date six months prior thereto is therefore 4 December 2007).

The defences set out in s588FG(1) are not available to you, as it is clear that the benefit you received because of the Transaction was received at a time when you had reasonable grounds for suspecting that the Company was insolvent or would become insolvent by reason of entering into the Transaction, further or alternatively, as it is clear that a reasonable person in your circumstances would have had grounds for so suspecting.

20. The liquidator demanded that Metcalf Cranes pay the sum of $62,000 back to the company and on its failure to do so took proceedings in the Magistrates' Court to recover the moneys. The amended statement of claim in the proceeding is dated 30 April 2010. The matter was heard on 31 May 2010 and on 1 June 2010 when judgment was given in favour of the plaintiffs, as indicated above.

THE APPEAL

21. The appeal is made pursuant to s109 of the *Magistrates' Court Act* 1989 which provides:

109 Appeal to Supreme Court from final order made in civil proceeding
(1) A party to a civil proceeding in the Court may appeal to the Supreme Court, on a question of law, from a final order of the Court in that proceeding.
(2) An appeal under subsection (1)—
(a) must be instituted not later than 30 days after the day on which the order complained of was made; and
(b) does not operate as a stay of any order made by the Court unless the Supreme Court so orders.
(3) Subject to subsection (2), an appeal under subsection (1) must be brought in accordance with the rules of the Supreme Court.
(4) An appeal instituted after the end of the period referred to in subsection (2)(a) is deemed to be an application for leave to appeal under subsection (1).
(5) The Supreme Court may grant leave under subsection (4) and the appellant may proceed with the appeal if the Supreme Court—
(a) is of the opinion that the failure to institute the appeal within the period referred to in subsection (2)(a) was due to exceptional circumstances; and
(b) is satisfied that the case of any other party to the appeal would not be materially prejudiced because of the delay.
(6) After hearing and determining the appeal, the Supreme Court may make such order as it thinks appropriate, including an order remitting the case for re-hearing to the Court with or without any direction in law.
(7) An order made by the Supreme Court on an appeal under subsection (1), other than an order remitting the case for re-hearing to the Court, may be enforced as an order of the Supreme Court.

22. The relevant rules of the *Supreme Court (General Civil Procedure) Rules* 2005 are as follows;

PART 3—APPEALS ON A QUESTION OF LAW
58.06 Application of Part
This Part applies to any appeal and to any application for leave to appeal—
(a) under section 109 of the **Magistrates' Court Act 1989**; ....
58.07 Commencement of appeal
An appeal under this Part is instituted by filing a notice of appeal in the Trial Division.

58.08 Notice of appeal
(1) A notice of appeal under this Part shall—
(a) be in writing signed by the appellant or the appellant's solicitor;
(b) set out or state—
(i) the order which is the subject of appeal;
(ii) whether the appeal is from the whole or part only of the order and, if so, what part;
(iii) the question of law upon which the appeal is brought;
(iv) concisely the grounds of appeal;
(v) the order sought in place of that from which the appeal is brought; and
(c) at its end, name all the persons on whom it is proposed to serve the notice of appeal.
....

58.09 Appellant to file affidavit

....

58.10 Directions

(1) Within seven days after filing notice of appeal, the appellant shall apply on summons to an Associate Judge for directions and, if necessary, for leave to appeal.
(2) The application is taken to be made when the summons is filed.
(3) Not less than 14 days before the day for hearing named in the summons, the appellant shall serve on the respondent to the appeal the summons together with a copy of the affidavit filed under Rule 58.09 and any exhibit.
(4) Not less than five days before the day for hearing named in the summons the respondent shall file and serve a copy of any affidavit in answer and shall serve a copy of any exhibit.
(5) If at any time the Associate Judge is satisfied that the hearing of the summons should be expedited, the Associate Judge may of his or her own motion or on application bring the summons on for hearing.
(6) Subject to paragraphs (7) and (8), the Associate Judge shall give directions with respect to the appeal.
(7) If leave to appeal is required—
(a) the Associate Judge shall determine whether leave to appeal is given; and
(b) if leave to appeal is refused, the Associate Judge shall dismiss the appeal.
(8) The Associate Judge may dismiss the appeal if satisfied that—
(a) the notice of appeal does not identify sufficiently or at all a question of law on which the appeal may be brought;
(b) the appellant does not have an arguable case on appeal or to refuse leave would impose no substantial injustice; or
(c) the appeal is frivolous, vexatious or otherwise an abuse of the process of the Court.

58.11 Leave to appeal

(1) An appeal instituted more than 30 days after the day on which the order under appeal was made is to be taken to be an application for leave to appeal.
(2) An application for leave to appeal shall be heard and determined by the Associate Judge under Rule 58.10.

23. The notice of appeal was filed on 30 June 2010. On 30 September 2010, Associate Justice Mahony dismissed certain grounds of appeal under Rule 58.10(b). He ordered that the appellant file and serve a further amended notice of appeal with a single question of law and one ground of appeal. Pursuant to the order on 30 September 2010, the appellant filed and served a further amended notice of appeal. The appeal is brought on the following question of law:

> Whether in the circumstances disclosed by the evidence there were reasonable grounds for the recipient creditor to "suspect" the insolvency of the company for the purposes of s588FG of the *Corporations Act* 2001.

24. The sole ground of the appeal is that His Honour erred in not considering, on the totality of the evidence, that the appellant's director had no reasonable grounds for suspecting that the respondent company was insolvent at the relevant time, and a reasonable person in his circumstances would have had no such grounds, within the meaning of s588FG of the *Corporations Act* 2001.

25. The appellant seeks an order that the complaint is dismissed and that the plaintiff/ respondent below pay the defendant/appellant's costs of the proceeding below fixed on the Magistrate's Scale "G", and of the appeal.

THE NATURE OF THE APPEAL

26. As indicated above, an appeal is only permitted on a question of law, from a final order of the Court in that proceeding. The question of law posed in the notice of appeal raises "the circumstances disclosed by the evidence."

27. The circumstances where issues over findings of fact may constitute a question of law were addressed by the High Court of Australia in *Humphrey Earl Ltd v Speechley*.[2] In that case, the High Court of Australia (Dixon, McTiernan, Williams, Webb and Fullagar JJ) considered whether the Workers Compensation Commission erred in law in holding that the injury suffered by the respondent was sustained in the course of his employment. Dixon J (with whom Williams, Webb and Fullagar JJ agreed) held that the question for decision by the court was whether the

conclusion of the judge of the Workers Compensation Commission was reasonably open to him upon the facts and the evidence.[3]

28. The respondent was employed to visit shops in the metropolitan area to repair and service machinery supplied by his employer to those shops. The respondent was injured in a road accident while riding on his motor cycle when returning from lunch to the shop where he was carrying out repair and service work for his employer. The issue before the judge of the Workers Compensation Commission was whether the injury to the respondent occurred during the course of his employment. The respondent did not have lunch at or near the shop where he was working but drove on his motor cycle to another town altogether so that he could have fish which he particularly wished to eat. Dixon J said that if the respondent deviated so far from what is reasonably incident to the execution of his duties as to proceed on a purpose of his own not fairly resulting from the nature or incidents of the employment, that purpose could not be considered in the course of his employment.[4]

29. Relevantly to the issue of what is a question of law in relation to findings of fact, Dixon J said that:

> Such questions must involve matters of degree, but it does not follow that their decision is always a question of fact open in point of law to a finding either way. Even in a matter of degree the facts may show so great a departure from what is an allowable incident of the employment that it is not open to a court to make any but one finding.[5]

30. Consistently with this proposition, after carefully reviewing the evidence, Dixon J found that the findings on the facts of the case – that the respondent was injured in the course of his employment - was not reasonably open to the commission. The approach of Dixon J involved a careful consideration of all the evidence before the trial judge and an assessment of whether the finding of the trial judge, that those facts satisfied the relevant legal test, was reasonably open to him.

31. William J agreed with Dixon J and McTiernan J and added that in his opinion "the only finding open in law upon the facts was that at the time of the injury of the respondent was engaged on a venture of his own and not on business of his employer."[6]

32. In *S v Crimes Compensation Tribunal*,[7] Phillips JA considered at length the issue of what constituted an appeal on a question of law. The appellant had sought to appeal against the decision of the Crimes Compensation Tribunal. An appeal under the relevant act, the *Appeals Tribunal Act*, lay only on a question of law.

33. Phillips JA observed that appeals on question of law commonly arise out of the attempt by a claimant to meet some statutory test. In dealing with this type of appeal, Phillips JA laid down three propositions as follows:

> (a) What is the proper meaning, as a matter of construction, of the statutory description which is relevant to the claimant's success or failure is a question of law.[8]
> (b) Once the task of construction is over, the question whether the claimant's particular circumstances fall within the relevant statutory description is essentially a question of fact.[9]
>
> (c) Nevertheless if, in determining whether the particular circumstances of the claimants are such as to fall within the relevant statutory description, the fact-finding tribunal arrives at a conclusion which was simply not open to it, that is an error of law; and the question whether it arrived at a conclusion which was not open to it is a question of law.

34. In support of the last proposition, Phillip JA relied on the decision of Dixon J in *Humphrey Earl Ltd v Speechley*.[10]

35. In *State of Victoria v Subramanian*,[11] Cavanough J considered at length the nature of an appeal under s109 of the *Magistrates' Court Act*.[12] He considered the application of S v Crimes Compensation Tribunal to s109. He observed that the principles in *S v Crimes Compensation Tribunal*[13] were also adopted by the Full Court in the *Transport Accident Commission v Hoffman*[14] when construing s52(1) of the *Administrative Appeals Tribunal Act*. He said that in *Victorian WorkCover Authority v Game*[15] the Court of Appeal cited *Transport Accident Commission v Hoffman*[16] in relation to the application of s109.

36. Cavanough J observed there was another line of cases relating to appeals under s109. [17] In *Cehner v Borg*,[18] the Court of Appeal held that s109 should be construed the same way as stated by Stephen J, in *Spurling v Development Underwriting (Vic) Pty Ltd*,[19] in relation to the old procedure for orders to review. Stephen J said that the court should treat the matter as an appeal from the verdict of a jury and should not make up its own mind upon the evidence but rather confine itself to seeing whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come or to put it another way whether on any reasonable view of the evidence the decision can be supported. It should be noted that this test is in substance that adopted by the High Court of Australia in *Humphrey Earl Ltd v Speechley*. [20]

37. Cavanough J held that the two lines of authority on the application of s109 were in substance equivalent. He held that the observations in *S v Crimes Compensation Tribunal*[21] should be seen as applicable to appeals under s109.[22] Cavanough J said that grounds of appeal, such as that evidence was wrongly admitted or rejected, misdirection by the trial judge or that the verdict was unreasonable or perverse or against the evidence or the weight of the evidence, would not constitute an appeal on a question of law.

38. Mr Evans, counsel for the respondents, contends that the appeal is in some ways a hearing *de novo*.[23] He submits that I am effectively sitting again as the magistrate and that if I agree with the magistrate then I should find there is no error of law demonstrated. If, on the other hand, I form the view based on the legal application of the legal principles to s588FG(2) as I perceive them, that the magistrate ought to have been satisfied, then the error of law is established and the appeal succeeds.[24]

39. Mr Gronow of counsel who appeared for the appellant submits that I must be satisfied that the magistrate was in error in not considering on the evidence before him that his client had made out the defence under sub-s2(b) of s588FG.

40. Neither counsel referred me to any authorities on the nature of an appeal under s109. After taking in account the authorities referred to above and taking into account the question of law raised and the ground of appeal alleged, I hold that to successfully appeal under s109, the appellant must satisfy me that it was not reasonably open on the evidence for the magistrate to conclude that Metcalf Cranes had not proved both of the elements of the statutory defence in sub-s2(b) of s588FG. The point of law is whether the conclusion of the magistrate was reasonably open on the evidence.[25]

41. As indicated above, the ability to contest a finding of fact by the magistrate is extremely limited. However, that is not an issue in this appeal as the parties have agreed the facts are not in dispute.

THE RELEVANT PREFERENCE LEGISLATION

42. The relevant provisions of Part 5.7B of Division 2 of the *Corporations Act* 2001 are as follows:

DIVISION 2 – Voidable Preferences

588FA Unfair preferences

(1) A transaction[26] 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.

588FC Insolvent transactions

A transaction of a company is an insolvent transaction of the company if, and only if, it is an unfair preference given by the company, or an uncommercial transaction of the company, and:

(a) any of the following happens at a time when the company is insolvent:

(i) the transaction is entered into; or

(ii) an act is done, or an omission is made, for the purpose of giving effect to the transaction; or

(b) the company becomes insolvent because of, or because of matters including:

(i) entering into the transaction; or
(ii) a person doing an act, or making an omission, for the purpose of giving effect to the transaction.

588FE Voidable transactions

....
(2) The transaction is voidable if:
(a) it is an insolvent transaction of the company; and
(b) it was entered into, or an act was done for the purpose of giving effect to it:
(i) during the 6 months ending on the relation-back day; or
(ii) after that day but on or before the day when the winding up began.

588FF Courts may make orders about voidable transactions

(1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:
(a) an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction;
....
(2) Nothing in subsection (1) limits the generality of anything else in it.
(3) An application under subsection (1) may only be made:
(a) during the period beginning on the relation-back day and ending:
(i) 3 years after the relation-back day; or
(ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company; whichever is the later; or
(b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.

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 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.

43. For the purposes of Part 5.7B of the *Corporations Act* 2001, 'transaction' is defined in s9 of the Act as follows:

transaction, in Part 5.7B, in relation to a body corporate or Part 5.7 body, means a transaction to which the body is a party, for example (but without limitation):
(a) a conveyance, transfer or other disposition by the body of property of the body; and
(b) a charge created by the body on property of the body; and
(c) a guarantee given by the body; and
(d) a payment made by the body; and
(e) an obligation incurred by the body; and
(f) a release or waiver by the body; and
(g) a loan to the body;
and includes such a transaction that has been completed or given effect to, or that has terminated.

THE EVIDENCE

44. There is no need for me to fully canvass the evidence of Mr Metcalf and his solicitor Mr Dunne. The parties are agreed that the facts are not in dispute. Mr Evans' submissions state the relevant evidence, with some slight amendments, was as follows. Mr Gronow did not disagree. The relevant evidence before the Court below on the issue included:

(1) Metcalf Cranes had been operating its business in the construction industry for 14 years, providing crane hire services to building sites;[27]
(2) during that 14 year period, Metcalf Cranes had only ever got to the point of suing a debtor 2 or 3 times;[28]
(3) Metcalf Cranes' director, Mr Metcalf, was familiar with the fact that builders in the construction industry occasionally go into liquidation leaving subcontractors [such as Metcalf Cranes] unpaid;[29]

(4) Crane hire services were provided by Metcalf Cranes to CCGV [as builder] at Mount Street, Heidelberg construction site between 11 February and 3 March 2008;[30]
(5) Metcalf Cranes stopped providing services after 3 March 2008 because it had not been paid for its work to 3 March 2008;[31]
(6) Metcalf Cranes knew that further crane services were required on site within another 2 weeks;[32]
(7) Mr Metcalf visited the site in March 2008 and was assured by CCGV's site administrator that payment would be made very soon;[33]
(8) in late March 2008, Metcalf Cranes was urged to return to site to provide further services, but refused to do so until paid.[34] Mr Evans contends that therefore Metcalf Cranes knew that this was not a case where the necessary services having been provided, there was no incentive for the debtor to pay for the work, but that the contrary was the case: CCGV needed crane services to complete the building works and wanted Metcalf Cranes to perform them, and knew (because Mr Metcalf told them) that they could not get the crane services from CCGV (its apparently preferred contractor) without first paying the existing debt;
(9) in late March 2008, Mr Metcalf was told by CCGV's site administrator at Mount Street that CCGV had already been paid for the building work which included the cost of engaging Metcalf Cranes to provide the crane services for which it had not been paid;[35]
(10) by 22 April 2008, Metcalf Cranes had instructed Mr Dunne as its solicitor to write a letter of demand to CCGV;[36]
(11) in response to the letter of demand, an offer by CCGV to pay the (undisputed) debt by instalments over a 6 month period was made;[37]
(12) at no point between March 2008 and the entry into of the terms of settlement was any reason ever offered to Metcalf Cranes by CCGV as to why the debt owed by it to Metcalf Cranes was not payable in full (including in the defence filed by CCGV[38], which Mr Dunne (the solicitor for Metcalf Cranes) said ought not to have been accepted as not disclosing a defence[39]);[40]
(13) at the pre-hearing conference where terms of settlement were entered into, CCGV agreed to pay Metcalf Cranes $6800 in costs (which would not have been incurred had the debt been paid prior to issue of the proceeding by Metcalf Cranes);[41]
(14) at the pre-hearing conference, CCGV still sought a further 60 days within which to pay Metcalf Cranes' undisputed debt as part of the terms of settlement.[42]

45. There are further facts that Mr Gronow also relies on.

(a) That in the building industry it is notorious that debts are not paid on time.
(b) That Mr Dunne conducted a search of CCGV and ascertained there were no outstanding judgment debts or applications to wind up CCGV.

THE RELEVANT LEGAL PRINCIPLES

46. There was no dispute that CCGV was insolvent at the time of the payments to Metcalf Cranes and that they were unfair preferences within the meaning of s588FA and accordingly were insolvent transactions within s588FC. The court's power to make orders, including repayment under s588F, were established.[43]

47. Metcalf Cranes bore the onus of establishing the statutory defence under s588FG(2). The central issue before the magistrate was whether or not Metcalf Cranes had proved the matters referred to in sub-s(2)(b).

48. In *Cussen v Commissioner of Taxation*,[44] the Court of Appeal of the Supreme Court of New South Wales, (Spigelman CJ, with whom Handley and Tobias JJA agreed), held that the words "a reasonable person in the person's circumstances in subs(2)(b)(ii) require an objective "reasonable business person " test to be applied and do not require the court to take into account the acumen, perspicacity and resources of the particular creditor.[45] At one stage, it had been suggested that a reasonable person in the person's circumstances may have required "that the "reasonable person" in the creditor's circumstances be a reasonable person with the knowledge and business qualifications of the creditor."[46] In *Cussen's case* the Court of Appeal held that the reasonable person is a reasonable business person and the test does not take into account the particular business skills of the creditor.

49. *Cussen's case* further establishes that the word "circumstances" does not refer to a personal characteristic of a creditor but to external factors such as those known to the creditor.[47] The creditor's circumstances referred to in sub-s2(b)(ii) include the full range of information actually available to the creditor. It includes the failure to make inquiries, if that be the case, but does not include what such inquiries would have revealed. The words "would have had" in (b)(ii) should

be construed as the "reasonable person's" assessment of information in fact in the possession of the creditor, into whose "circumstances" the reasonable business man is theoretically placed.

50. The meaning given to "suspicion" is well settled.[48] In *Queensland Bacon Pty Ltd v Rees*,[49] Kitto J stated:

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

51. In *D'Aloia v Federal Commissioner of Taxation*[50] Merkel J held that the test in subparagraph (b)(i) is essentially a subjective test based on objective criteria in so far as it requires consideration of whether the person "had" any grounds for suspecting insolvency. He said that the test in subparagraph (b)(ii) is an objective test, as it requires consideration of whether a reasonable person in the creditor's circumstances had any reasonable grounds for suspecting insolvency. [51] In *Dean-Willocks v Commissioner of Taxation*[52] Barrett J said that he did not think it helpful to attempt to characterise one inquiry as "subjective" and the other as "objective." He said that one should merely approach the two inquiries according to the terms in which they have been expressed by the legislature. He agreed with the observations of Bryson J in *Mann v Sangria Pty Ltd*[53] that "it would be seldom that the two tests would produce different results, although it is conceivable that a person might be afflicted by some personal difficulty in forming a suspicion."

52. It is not necessary for me to resolve any differences in approach between that of Merkel J and Barrett J, if there be any. Relevantly, in this case attention was directed at the existence of reasonable grounds for the formation of the relevant suspicion by Metcalf Cranes or a reasonable person in the Metcalf Crane's circumstances. No distinction between the two was taken by either party.

53. In *Sutherland v Eurolinx*,[54] Santow J said that there need be no single factor which establishes the relevant suspicion but rather a combination of factors for and against must be balanced and the cumulative impact on the payee assessed. He said:

> The case law illustrates that there is no single factor whose presence invariably establishes that there was, or should have been, the requisite suspicion. Rather it is a question of looking not in hindsight but through the contemporary eyes of the parties, at the commercial circumstances then prevailing between them. This is to identify in that context those factors pointing towards insolvency of the debtor. This in turn is in order to ascertain which of those factors were apparent to the payee, and then the cumulative impact that knowledge of them should have had, or did have, upon the payee. There will also be potentially countervailing factors and circumstances to be weighed in the balance which could have tended to dispel suspicion at the time.[55]

54. In *Sparad (No 100) Ltd v J B Harkness*,[56] Priestly JA warned against placing undue weight on dilatory payment, and observed that "debts are not always paid on time by solvent traders."

55. In *Sandell v Porter*[57] Barwick CJ warned that "the conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity."

THE FINDINGS OF THE MAGISTRATE

56. Mr Gronow summarised the learned magistrate's reasons for rejecting the defence[58] as follows. Mr Evans did not dispute this summary.

> (a) The appellant bore the onus of making out the defence on the balance of probabilities and had not done so;
> (b) The appellant's invoices were not disputed at the time and payment was promised;
> (c) The respondent company had itself been paid for the work;

(d) The appellant must have had an 'idle wondering' as to whether it would be paid;
(e) The appellant refused to do further work on the project and sued for the outstanding amounts;
(f) An offer to pay by instalments was made and refused;
(g) No credible reason was asserted by the respondent company for denying the debt;
(h) The respondent company's defence in the debt recovery proceeding did not make allegations disputing the debt but merely declined to admit it; and
(i) An offer was made to pay the full amount and the directors of the respondent company acknowledged the debt in the August 2008 terms of settlement, so the defence to the claim must have been a delaying tactic.

57. There was no suggestion that Metcalf Cranes did not receive the benefit of the transaction in "good faith" as referred to in s588FG(2)(a).

THE CONTENTIONS OF THE APPELLANT

58. Mr Gronow contends that the only bases on which it was found that the appellant's director Mr Metcalf had reason to suspect the insolvency of the respondent company in August or September 2008 (or earlier) were the late payment of the appellant's invoices for work the appellant had in fact performed and CCGV subsequently disputing the debt by defending the proceeding to recover it, as a delaying tactic.

59. Mr Gronow says that it is common for solvent debtors to dispute debts and delay payment. He says that neither Mr Metcalf nor Mr Dunne was aware of the respondent company's insolvent liquidation until July 2009.

60. Mr Gronow contends that the magistrate's reasoning that the delay in payment of the debt, despite no credible ground for disputing it being put forward; Mr Metcalf's refusal to continue work until paid; his instructing a solicitor to recover the debt; and the defence of the Magistrates' Court claim for the debt were capable of constituting objective grounds for suspecting insolvency for s588FG(2)(b) purposes, is flawed. He says that none of these points to more than a desire of CCGV to avoid paying the debt for as long as possible rather than an inability to pay it.

61. Mr Gronow argues that each factor that the learned magistrate found to exist in fact can suggest the opposite conclusion, namely that CCGV was solvent, and that the debt could be recovered by the application of appropriate pressure.

62. He submits that in the magistrate's reasons the learned magistrate appears to have conflated a mere 'idle wondering' with the requisite 'apprehension' to give rise to grounds for "suspicion", which was directly contrary to the Queensland *Bacon v Rees* test.

63. Mr Gronow contends that the magistrate must therefore be regarded as having misapplied the tests in the authorities, and that there was no basis for the learned magistrate failing to find that, on the uncontested facts and evidence below, the appellant had satisfied both the subjective and objective parts of s588FG(2)(b).

64. Mr Gronow argues that the appellant's director (and solicitor) in fact had no reason to doubt that the company could pay its debts at the relevant times because:

(a) the respondent company's solicitors' correspondence in April 2008 (prior to the commencement of proceedings) said that the company was able to pay the amounts owing, but wished to do so by instalments;

(b) the appellant's solicitor did a company search in late April 2008 shortly before commencing the original Magistrates' Court proceeding that did not show any winding up proceeding on foot or give any other cause for concern about the company's solvency;

(c) the respondent company and its directors settled the claim in August 2008 by the directors accepting an obligation to pay $65,000 by 5 September 2008, which money was in fact paid on time; and

(d) the respondent company was not ordered to be wound up until 28 November 2008, and the notification of the winding up order was not made until 1 December 2008.

65. Mr Gronow says that none of those things gave rise to subjective or objective grounds to 'suspect' insolvency for the purposes of s588FG(2)(b) of the Act.[59]

CONTENTIONS OF THE RESPONDENT

66. I have already set out the relevant facts that Mr Evans relies on. Mr Evans says that the fact that it is common for solvent debtors to dispute debts and delay payment (especially in the building trade) does not, as submitted by Metcalf Cranes, provide strong support for the defence under s588FG(2)(b)(ii). The test is only one of "suspicion".

67. He argues that the facts in the present case went far beyond "mere" slow or delayed payment of a debt, as the magistrate clearly spelt out to Metcalf Cranes' counsel below, when a similar submission was put to him.[60]

68. He concludes that in the present case, there was ample evidence before the Court from which it could conclude that Metcalf Cranes could not establish that, as at the date of payment, a reasonable person in its circumstances would have had no reasonable grounds for suspecting that CCGV was insolvent.

WERE THE FINDINGS REASONABLY OPEN TO THE COURT?

69. Both parties agreed that the relevant "time when the person became such a party" to the transaction as referred to in s588FG(2) was at the time of the settlement.

70. As indicated above, it is necessary for me to fully consider the evidence before the magistrate. In doing so I take in account the matters relied on by both counsel.

71. After Metcalf Cranes completed the cranage work it had done up to 3 March 2008, Metcalf Cranes issued its last invoice on 3 March 2008. The crane was moved to another site on 4 March 2008. Subsequently, Mr Metcalf and his sales manager went to the building site and spoke to the site administrator and the project manager. He asked them when he would be paid and they assured him it would be very soon and they had no issue with money.[61] Further cranage work was required by CCGV on the site. I was informed a block of apartments was being built on the site. It was obviously a large project as some $55,000 was spent on cranage work and more had to be done. CCGV requested Metcalf Cranes to do the work. Apparently, CCGV had no issues with the quality of service provided by Metcalf Cranes. Mr Metcalf refused to do the work until Metcalf Cranes was paid. Mr Metcalf was told by CCGV that CCGV had been paid for the work done by Metcalf Cranes. Mr Metcalf was told in telephone conversations[62] with CCGV that if Metcalf Cranes did not do the work then CCGV would obtain another crane hire company to provide the crane. It must have appeared odd to Mr Metcalf that CCGV would not pay Metcalf Cranes when CCGV wanted Metcalf Cranes to do further necessary work on the site (which Metcalf refused to without being paid) and CCGV had been paid for the work done by Metcalf Cranes.

72. Mr Metcalf retained solicitors to recover the debt. On 21 April 2008, his solicitors conducted a search of CCGV. If normal terms are 30 days, then the final account was overdue some 18 days. Mr Metcalf conceded that when he retained his solicitor that he no longer believed that he was going to receive a cheque anytime soon.[63] He agreed that his solicitor had received a letter on 28 April 2008 from CCGV's solicitors offering to pay the debt by instalments the first of which was not payable for some two months and the balance of the instalments were no payable until October.[64] The inference was open that CCGV had gone to the expense of retaining a solicitor in its efforts to avoid paying the moneys owed to Metcalf Cranes. Mr Evans put to Mr Metcalf that he therefore understood that CCGV was not in a position to pay him immediately. He answered: Again I was led to believe they had the money and they weren't paying.[65]

73. Mr Evans put it to Mr Metcalf that he must have been having doubts, even by 28 April, about whether CCGV was in a position to pay the debt.

> Mr Evans: "I put it to you that the reasons – well, I say to you that it must have been apparent to you that the reason why they were delaying when you have already issued a proceeding against them, have already offered to pay by instalments, is because they might not be able to pay?"
> Mr Metcalf: "Well that is not how I see it."
> His Honour: "How did you see it?"
> Mr Metcalf: "Well, as I said earlier, the – that behaviour in the building game is common. For whatever reason, people don't pay their bills. It is common, so – and if I want to get bogged down on ---"
> His Honour: "What's common though?"
> Mr Metcalf "Not getting paid on time."

His Honour: "Is it common for a builder simply not pay you ?" on time. --- on time?"
Mr Metcalf: "Correct."[66]

74. Under cross examination, Mr Metcalf was asked whether he sued people often and he said only when he does not get paid. He said that in 14 years, he had only sued two or three times.[67]

75. Metcalf Cranes instituted legal proceedings on 1 May 2008 and on 29 May served the complaint on the director guarantors. The defence filed by CCGV was no real defence at all, indicating that it had no quarrel with the amount of the claim or the quality of the work. The terms of settlement reached on 4 August 2008, involved the guarantors agreeing to pay some $7,000 more than the outstanding debt ($62,000). Under the settlement that amount was not payable to 5 September 2008.

76. In substance, Metcalf Cranes contends that the facts show CCGV had merely disclosed a reluctance on its part to pay its debt to Metcalf Cranes and that did not constitute reasonable grounds for suspecting that CCGV was not be able to pay its debts as they fell due. It is trite to say that each case must turn on its own circumstances. Although the facts in this case are not in issue, the inferences that can be drawn from them may vary depending on the significance given to the particular facts. The tests to be applied by the Magistrate involved making a finding about suspicions that could be drawn from the facts.

77. In my opinion, the conduct of CCGV does raise the inference that CCGV may have been unable to pay its debts as they fell due and that CCGV's conduct in resisting Metcalf Crane's just claim was evidence of that inability.

78. As indicated above, Metcalf Cranes say that none of this conduct points to more than a desire of CCGV to avoid paying the debt for as long as possible rather than an inability to pay it. Metcalf Cranes argues that each factor that the learned magistrate found to exist in fact can suggest the opposite conclusion, namely that CCGV was solvent, and that the debt could be recovered by the application of appropriate pressure.

79. The conduct may well have been consistent with a desire to delay payment. But the issue before the magistrate was whether Metcalf Cranes had proved that Metcalf Cranes had no reasonable grounds for suspecting CCGV was insolvent at that time and a reasonable person in Metcalf Cranes' position would have no such grounds for suspecting. I accept that suspecting involves more than idle wondering and must be a positive feeling of actual apprehension or mistrust without sufficient evidence. Suspecting is a state of mind that may not be evidenced by any outward conduct on the part of the person suspecting. In such cases it is a question of inference from the information available to that person whether or not the person relevantly suspects. The observations of Lord Esher MR in *English and Scottish Mercantile Investment Co v Brunton*[68] are apposite to this issue. His Lordship spoke of inferences of fact being "drawn because you cannot look into a man's mind."[69] The relevant statutory test asks whether Metcalf Cranes proved that it, and a reasonable person in its circumstances, had no reasonable grounds for suspecting that the company was insolvent. As indicated in *Sutherland v Eurolinx*,[70] I should not consider the evidence with the benefit of hindsight and I should consider the cumulative impact of the relevant evidence both for and against establishing absence of the relevant suspicion. I am also conscious of the fact that the mere failure to pay debts on time does not by itself constitute grounds for suspecting insolvency. I have also had regard to the other applicable principles referred to above.

80. In my opinion, the evidence referred to leaves reasonably open the conclusion that Metcalf Cranes had not proved that it, and a reasonable person in its circumstances, had no reasonable grounds for suspecting (being a state of mind in the relevant sense) that CCGV was insolvent when the settlement was reached.

81. Accordingly, in my opinion, the learned magistrate did not err in law in so concluding.

CONCLUSION

82. For these reasons, I dismiss the appeal with costs including all reserved costs.

[1] Proceedings no Y02924563.

[2] [1951] HCA 75; (1951) 84 CLR 126; [1952] ALR 46; (1951) 25 ALJR 616.
[3] [1951] HCA 75; (1951) 84 CLR 126 at 133; [1952] ALR 46; (1951) 25 ALJR 616.
[4] [1951] HCA 75; (1951) 84 CLR 126 at 134; [1952] ALR 46; (1951) 25 ALJR 616.
[5] [1951] HCA 75; (1951) 84 CLR 126 at 134; [1952] ALR 46; (1951) 25 ALJR 616.
[6] [1951] HCA 75; (1951) 84 CLR 126 at 139; [1952] ALR 46; (1951) 25 ALJR 616.
[7] [1998] 1 VR 83.
[8] [1998] 1 VR 83 at 88.
[9] [1998] 1 VR 83 at 89.
[10] [1951] HCA 75; (1951) 84 CLR 126 at 134; [1952] ALR 46; (1951) 25 ALJR 616 per Dixon J.
[11] [2008] VSC 9; (2008) 19 VR 335.
[12] In *Qantas Airways Ltd v Portelli* [2011] VSC 162, Habersberger J cited *State of Victoria v Subramanian* [2008] VSC 9; (2008) 19 VR 335 with approval. Reference can also be made to *Cohen v Accounts Control Management Services Pty Ltd* [2009] VSC 618 per Vickery J.
[13] [1998] 1 VR 83 at 88.
[14] [1989] VR 17.
[15] [2007] VSCA 86; (2007) 16 VR 393 at [13]- [15] per Ashley JA.
[16] [1989] VR 17.
[17] In addition to *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1; (1972) 30 LGRA 19; see *Myer Store Ltd v Jovanovic* [2004] VSC 478 at [7] and *Insurance Manufacturers of Australia Pty Ltd v Heron* [2005] VSC 482 at [63]- [64].
[18] [2003] VSCA 72.
[19] [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19.
[20] [1951] HCA 75; (1951) 84 CLR 126; [1952] ALR 46; (1951) 25 ALJR 616.
[21] [1998] 1 VR 83 at 88.
[22] [2008] VSC 9; (2008) 19 VR 335 at [32].
[23] Tr 35.
[24] Tr 36-37.
[25] See *Green v Victorian WorkCover Authority* [1997] 1 VR 364 at 372-372 per Tadgell J, with whom Phillips and Charles JJA agreed on this issue.
[26] Section 9 provides a definition of "transaction" for the purposes of Part 5.7B.
[27] Tr 58.18-25.
[28] Tr 68.25-31.
[29] Tr 58.27.
[30] Tr 54.41.
[31] Tr 58.41-44.
[32] Tr 59.20-22; Tr 62.43.
[33] Tr 55.
[34] Tr 55.42-56.7; Tr 61.21.
[35] Tr 61.28.
[36] Tr 66.15.
[37] Exhibit 3 – part of "JD3".
[38] Exhibit 6 – part of "JD3".
[39] Tr 46.26-42.
[40] Tr 68.6-11.
[41] Exhibit 7 – part of "JD3".
[42] Tr 49.9.
[43] *Cussen v Commissioner of Taxation* [2004] NSWCA 383; (2004) 22 ACLC 1528; (2004) 51 ACSR 530 at 533; 57 ATR 499 per Spigelman CJ with whom Handley and Tobias JJA agreed (*Cussen's case*).
[44] [2004] NSWCA 383; (2004) 22 ACLC 1528; (2004) 51 ACSR 530; 57 ATR 499.
[45] *Cussen's case* [2004] NSWCA 383; (2004) 22 ACLC 1528; (2004) 51 ACSR 530 at [30] - [31]; 57 ATR 499.
[46] *Sims v Celcast Pty Ltd* [1998] SASC 7140; (1988) 71 SASR 142 at 144; (1998) 16 ACLC 1140 per Williams J; *D'Aloia v Federal Commissioner of Taxation* [2003] FCA 1336; (2003) 203 ALR 609 at [27]; (2003) 48 ACSR 204; 54 ATR 366 per Merkel J.
[47] *D'Aloia v Federal Commissioner of Taxation* [2003] FCA 1336; (2003) 203 ALR 609 at [29]; (2003) 48 ACSR 204; 54 ATR 366.
[48] *Re Benward Lane Pty Ltd (in liquidation)* (2009) 27 ACLC 1381, *Dean-Willocks v Commissioner of Taxation* [2008] NSWC 113 at [12] per Barrett J.
[49] [1966] HCA 21; (1966) 115 CLR 266 at 303; [1966] ALR 855 at 874.
[50] (2003) FCA 1336; (2003) 203 ALR 609; (2003) 48 ACSR 204; 54 ATR 366.
[51] [2003] NSWSC 466; (2003) 45 ACSR 564; see also *Sutherland v Eurolinx* [2001] NSWSC 230; (2001) 37 ACSR 477 at [38]; 19 ACLC 633 per Santow J.
[52] [2008] NSWSC 113 at [10] per Barrett J.
[53] [2001] NSWSC 172; (2001) 38 ACSR 307 at [46]; (2001) 19 ACLC 696.
[54] [2001] NSWSC 230; (2001) 37 ACSR 477 at [43]; 19 ACLC 633.
[55] [2001] NSWSC 230; (2001) 37 ACSR 477 at [44]; 19 ACLC 633.
[56] Unreported, Full Court of Supreme Court of New South Wales, 14 February 1997, Priestly JA referred to in *Sutherland v Eurolinx* [2001] NSWSC 230; (2001) 37 ACSR 477 at [46]; 19 ACLC 633.

[57] [1966] HCA 28; (1966) 115 CLR 666 at 670; 40 ALJR 71.
[58] See transcript 1 June 2010 pp169-172.
[59] Queensland Bacon Pty Ltd v Rees [1966] HCA 21; (1966) 115 CLR 266; [1966] ALR 855; 40 ALJR 13; Re Denward Lane Pty Ltd (2009) 27 ACLC 1381.
[60] Tr 115-118.
[61] Tr 55.
[62] Tr 64.
[63] Tr 66
[64] Tr 66
[65] Tr 66 lines 35-36
[66] Tr 67
[67] Tr 68
[68] [1892] 2 QB 700. This has been cited with approval by the High Court in *Marcolongo v Chen* [2011] HCA 3 (9 March 2011) at [26].
[69] [1892] 2 QB 700 at 708.
[70] [2001] NSWSC 230; (2001) 37 ACSR 477 at [43]; 19 ACLC 633.

APPEARANCES: For the appellant Metcalf Crane Services Pty Ltd: Mr MGR Gronow, counsel. John Dunne and Associates, solicitors. For the respondent Rathner: Mr JL Evans, counsel. A'Beckett Lawyers.
