FEDERAL COURT OF AUSTRALIA

Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd v Metal Manufactures Pty Limited [2021] FCAFC 228

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| File number: |  |
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| Judgment of: | **ALLSOP CJ, MIDDLETON AND DERRINGTON JJ** |
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| Date of judgment: | 16 December 2021 |
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| Catchwords: | **CORPORATIONS** – question reserved for consideration of the Full Court pursuant to s 25(6) of the *Federal Court of Australia Act 1976* (Cth) – whether set-off under s 553C(1) of the *Corporations Act 2001* (Cth) (**Act**) available to the defendant against the plaintiff’s claim as liquidator for the recovery of an unfair preference under s 588FA of the Act – effect of a preference, nature of the preference action, and consequences of the success of such an action in Australian insolvency law – nature of mutuality – nature and history of set-off prior to and following the Harmer Report – set-off not available against the recovery of an unfair preference – requisite mutuality not present – right to the recovery of the preference is a right of the liquidator and not the company, in the liquidator’s own right for the benefit of all creditors and the administration of the estate under the terms of the relevant statutory regime |
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| Legislation: | *Bankruptcy Act 1924* (Cth)  *Bankruptcy Act 1966* (Cth)  *Corporate Law Reform Act 1992* (Cth)  *Corporations Act 2001* (Cth)  *Federal Court of Australia Act 1976* (Cth)  *Federal Court Rules 2011* (Cth)  *Income Tax Assessment 1936* (Cth)  *Judiciary Act 1903* (Cth)  *Bankruptcy Act 1883* (UK)  *Bankruptcy Act 1914* (UK)  *Companies (Consolidation) Act 1908* (UK)  *Companies Act 1862* (UK)  *Companies Act 1948* (UK)  *Insolvency Act 1986* (UK) |
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| Cases cited: | *Airservices Australia v Ferrier* [1996] HCA 54; 185 CLR 483  *Akers as a joint foreign representative of Saad Investments Company Limited (in Official Liquidation) v Deputy Commissioner of Taxation* [2014] FCAFC 57; 223 FCR 57  *Burns v Stapleton* [1959] HCA 34; 102 CLR 97  *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109; 81 NSWLR 47  *Calzaturificio Zenith Pty Ltd (in Liq) v NSW Leather & Trading Co Pty Ltd* [1970] VR 605  *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20; 268 CLR 524  *Citibank Ltd v Papandony* [2002] NSWCA 375  *Commissioner of Taxation v Lane* [2020] FCAFC 184; 385 ALR 92  *Community Development Pty Ltd v Engwirda Construction Company* [1969] HCA 47; 120 CLR 455  *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* [2020] FCAFC 192; 282 FCR 1  *Cook v Italiano Family Fruit Company Pty Ltd* [2010] FCA 1355 190 FCR 474  *Day & Dent Constructions v North Australian Properties Pty Ltd (Provisional Liquidator Appointed)* [1982] HCA 20; 150 CLR 85  *Re Anglo French Cooperative Society; Ex Parte Pelly* [1882] 21 Ch D 492  *Federal Commissioner of Taxation v Jaques* [1956] HCA 40; 95 CLR 223  *Federal Commissioner of Taxation v Linter Textiles Australia Limited (In liq)* [2005] HCA 20; 220 CLR 592  *Flitcroft’s Case* [1882] 21 Ch D 519  *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; 234 CLR 52  *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2014] NSWCA 148; 87 NSWLR 728  *Franklin’s Selfserve Pty Ltd v Federal Commissioner of Taxation* [1970] HCA 33; 125 CLR 52*Wily v St George Partnership Banking Ltd* (1998) 84 FCR 423  *G & M Aldridge Pty Ltd v Walsh* [2001] HCA 27; 203 CLR 662  *Gye v McIntyre* [1991] HCA 60; 171 CLR 609  *Hall v Poolman* [2007] NSWSC 1330; 65 ACSR 123  *Hicks v Minister* [2003] FCA 757  *Hiley v People’s Prudential Assurance Co Ltd* [1938] HCA 40; 60 CLR 468  *In re a Debtor; Ex parte Peak Hill Goldfield Limited* [1909] 1 KB 430  *In Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch D 809  *In Re Milan Tramways Company* (1884) 25 Ch D 587  *In re Mouat; Kingston Cotton Mills Co v Mouat* [1899] 1 Ch 831  *In the Matter of ACN 007 537 000 Pty Ltd (in liq) & Parker* [1997] FCA 1264; 80 FCR 1  *Jetaway Logistics Pty Ltd (rec & mgrs app’d) (in liq) v Deputy Commissioner of Taxation* [2008] VSC 397; 68 ACSR 226  *Jones (Liquidator) v Matrix Partners Pty Ltd; in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* [2018] FCAFC 40; 260 FCR 310  *Kuru v New South Wales* [2008] HCA 26; 236 CLR 1  *N W Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 1 WLR 1324  *NA Kratzmann Pty Ltd (in liq) v Tucker, Liquidator of Reed Murray Developments Qld Pty Ltd (No 2)* [1968] HCA 44; 123 CLR 295  *NA Kratzmann Pty Ltd (in liq) v Tucker, Liquidator of Reed Murray Developments Qld Pty Ltd (No 1)* [1966] HCA 72; 123 CLR 257  *National Bank of Australasia Ltd v Mason* [1975] HCA 56; 133 CLR 191  *Octavo Investments Pty Limited v Knight* [1979] HCA 61; 144 CLR 360  *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* [2009] NSWCA 84; 76 NSWLR 195  *Quickfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd* [2014] FCAFC 70; 222 FCR 13  *Re A & J Lazzarotto Pty Ltd* (unreported) 1977 BC 7700145)  *Re a* *Debtor; Ex parte Peak Hill Goldfield Ltd* [1909] 1 KB 430  *Re Amour* (1956) 18 ABC 69  *Re Clements* (1931) 7 ABC 255  *Re Country Stores Pty Ltd* (1987) 11 ACLR 385; 5 ACLC 636  *Re Discovery Books Pty Ltd* (1973) 20 FLR 470  *Re Fresjac Pty Ltd (in liq); Campbell v Michael Mount PPB* (1995) 65 SASR 334  *Re Grezzana* (1932) 4 ABC 203  *Re Hermann; Ex parte Official Assignee* (1916) 16 SR (NSW) 264  *Re Kolb; Ex parte England v Commissioners of Taxation* (1994) 51 FCR 31  *Re Kolb; Ex parte England v Commissioners of Taxation* [1994] FCA 359; 51 FCR 31  *Re Nortel Companies* [2013] UKSC 52; 4 All ER 887  *Re Smith* (1933) 6 ABC 49  *Re Trustee of the Property of O’Halloran* [2002] FCA 1305  *Re William Hockey Ltd* [1962] 1 WLR 555  *Re Yagerphone Ltd* [1935] 1 Ch 392  *Richardson v Commercial Banking Co of Sydney Ltd* [1952] HCA 8; 85 CLR 110  *Sheahan v Carrier Air Conditioning Pty Ltd* [1997] HCA 37; 189 CLR 407  *Shirlaw v Lewis* (1993) 10 ACSR 288  *SJP Formwork (Aust) Pty Ltd (in liq) v Deputy Commissioner of Taxation* [2000] NSWSC 604; 34 ACSR 604  *Smith v Boné* [2015] FCA 319; 104 ACSR 528  *Starkey (as liq of Allan Fitzgerald Pty Ltd (in liq)) v Deputy Commissioner of Taxation* [1994] 1 Qd R 142  *Union Bank v Wolas* 502 US 151 (1991)  *Williams v Lloyd* [1934] HCA 1; 50 CLR 341  *Willmott v London Celluloid Company* (1886) 34 Ch D 147  *Wily v St George Partnership Banking Ltd* (1999) 84 FCR 423  Baldwin ET, *A Treatise upon the Law of Bankruptcy and Bills of Sale* (10th ed, Stevens and Haynes, 1910)  Ford HAJ, Austin RP, Anderson C, and Morrison DS, *Principles of Corporations Law* (7th ed, Butterworths, 1995)  Goode RM *Principles of Corporate Insolvency Law* (2nd ed, Sweet & Maxwell, 1997)  Holdsworth W, *A History of English Law* (2nd ed, Methuen and Co Sweet and Maxwell, 1971)  Hunter M, Graham D and Crystal M, *The Law and Practice of Bankruptcy* (19th ed, Stevens and Sons, 1979)  Lewis AN and Rose DJ, *Australian Bankruptcy Law* (10th ed, Law Book Co, 1994)  Lewis AN and Rose DJ, *Australian Bankruptcy Law* (8th ed, Law Book Co, 1984)  May HW and Edwards WD (ed), *The* *Law of Fraudulent and Voluntary Conveyances* (Steven and Haynes, 3rd ed 1908)  May HW and Edwards WD (ed), *The* *Law of Fraudulent and Voluntary Conveyances* (3rd ed, Steven and Haynes, 1908)  McDonald EF, Deane WP, *Australian Bankruptcy Law and Practice* (4th ed, Law Book Co, 1968)  McDonald EF, Henry HA, Meek HG, Manning JK and Bohringer LG, *Australian Bankruptcy Law and Practice* (3rd ed, Law Book Co, 1953)  McPherson BH, *The Law of Company Liquidation* (1st ed, Law Book Co, 1968)  Meagher RP, Heydon JD, Leeming MJ and Turner PG, *Meagher Gummow and Lehane’s Equity: Doctrines and Remedies* (5th ed, LexisNexis Butterworths, 2015)  Williams RLV and Hansell EW, *The Law and Practice in Bankruptcy* (7th ed, Stevens and Sons 1898)  Williams RLV, Hansell EW and Hansell ME, *The Law and Practice in Bankruptcy* (11th ed, Stevens and Sons, 1915) |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Number of paragraphs: | 221 |
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| Date of hearing: | 26 August 2021 |
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| Counsel for the Plaintiffs: | Mr J McKenna QC with Mr P O’Brien |
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| Solicitor for the Plaintiffs: | Taylor David Lawyers |
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| Counsel for the Defendant: | Mr J Gleeson SC with Mr G McNally SC and Mr J Pokoney |
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| Solicitor for the Defendant: | Breene & Breene Solicitors |

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| **Table of Corrections** |  |
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| 13 January 2022 | Defendant’s name has been amended on the Court file from “Metal Manufacturers Pty Limited” to “Metal Manufactures Pty Limited”. |

ORDERS

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|  | | QUD 31 of 2021 |
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| BETWEEN: | GAVIN MORTON AS LIQUIDATOR OF MJ WOODMAN ELECTRICAL CONTRACTORS PTY LTD (IN LIQUIDATION) ACN 602 067 863  First Plaintiff | |
| MJ WOODMAN ELECTRICAL CONTRACTORS PTY LTD (IN LIQUIDATION) ACN 602 067 863  Second Plaintiff | |
| AND: | METAL MANUFACTURES PTY LIMITED ACN 003 762 641  Defendant | |

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| order made by: | ALLSOP CJ, MIDDLETON AND DERRINGTON JJ |
| DATE OF ORDER: | 16 December 2021 |

THE COURT ORDERS THAT:

1. The question reserved by Derrington J for consideration of the Full Court pursuant to s 25(6) of the *Federal Court of Australia Act 1976* (Cth), being:

Is statutory set-off, under s 553C(1) of the *Corporations Act 2001* (Cth) (**Act**), available to the defendant in this proceeding against the plaintiff’s claim as liquidator for the recovery of an unfair preference under s 588FA of the Act?

be answered: “No”.

2. Within 14 days the parties submit an agreed order as to costs, or, in the absence of agreement, the parties file submissions of no more than two (2) pages on the question of costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ALLSOP CJ:

## The special case

1 Before the Court is a special case under rule 38.01 of the *Federal Court Rules 2011* (Cth) to give effect to the reservation of a question for the Full Court under s 25(6) of the *Federal Court of Australia Act 1976* (Cth) brought forward by Derrington J.

2 The question concerns the right of a creditor who had received an unfair preference under s 588FA of the *Corporations Act 2001* (Cth) (**Act**) to avail itself of the statutory set-off in s 553C of the Act. The creditor claims to be entitled to set off its obligation under s 588FF of the Act to repay the preference received not against the underlying debt, but against another debt owed by the company in liquidation to it.

3 The special case was supported by agreed facts that the defendant creditor received payments during the relation back period of $190,000. The quantum of the creditor’s alleged set-off is admitted to be $194,727.23, arising otherwise than from the underlying debts owed by the company and the subject of the payments during the relation-back period said to be preferences. The liquidator concedes that subs 553C(2) does not apply on the facts. The liquidator concedes that if set-off is available the proceeding instituted to recover the preferential payments must be dismissed.

4 The question reserved by Derrington J for consideration of the Full Court was as follows: Is statutory set-off, under s 553C(1) of the Act, available to the defendant in this proceeding against the plaintiff’s claim as liquidator for the recovery of an unfair preference under s 588FA of the Act?

5 The answer to the question is: No.

6 A summary of the reasons for this answer, which summary is to be read with the more detailed reasons below is as follows.

7 There is a lack of mutuality between the indebtedness of the company to the creditor and the liability of the creditor pursuant to court order to pay the company at the suit of the liquidator. The lack of mutuality arises from the different interest in which the company owes money to the creditor and in which the company receives money pursuant to the liability to repay not as a creditor of the preferred creditor, but as a payee pursuant to court order in an action brought by the liquidator in the execution of her or his duty to gather in the estate of the insolvent company for the benefit of all unsecured creditors and the administration of the estate. The lack of mutuality also arises from the absence at the relevant date of any right or equity (vested or contingent) in the company or duty or obligation (vested or contingent) in the creditor to recover or to repay the preference, respectively. Thus, the essential requirements of s 553C are absent.

8 That this is the position derives from an understanding of the legal context before the *Corporate Law Reform Act 1992* (Cth) (the **1992 Act**), the text and context of changes made by the 1992 Act, including the enactment history and secondary materials, and the lack of any evident statutory purpose to bring about significant change in underlying principle affecting mutuality and unfair preferences. The above way of expressing the matter should not be seen as a departure from the importance of the text of the relevant provision or from the principles enunciated in the High Court as to statutory construction (about which there was no debate in the argument) and as encapsulated in the reasons of Middleton J, with which I agree. (See also *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* [2020] FCAFC 192; 282 FCR 1 at 5–6 [2]–[5]). The text of a relevant provision of the Act introduced by the 1992 Act (s 588FI) is not consistent with s 553C being engaged by a debt to a preferred creditor and the liability of the preferred creditor to disgorge the preference. This construction and conclusion best reflects and vindicates the underlying purposes of both the law of set-off in insolvency and the law of preferences: by justly protecting creditors where genuinely reciprocal or mutual debts, credits or mutual dealings exist by netting such off in working out what is owed by and to the insolvent estate, which process in no way interferes with the *pari passu* distribution from the estate being part of an antecedent process to establish the estate and the claims upon it; and by ensuring that past preferential transactions are unwound to put the estate in the position in which it would have been had the preferential transaction not occurred, so that thereafter all creditors (including the erstwhile preferred creditor) may share equally in an estate unaffected by earlier preferential transactions.

## The nature of the task by way of statutory construction

9 The question is one of statutory construction, being the meaning and content of s 553C and also the meaning and content of the provisions concerned with the unfair preference and the action to remedy its consequences in Pt 5.7B of the Act, in particular ss 588FA, 588FE, 588FF and 588FI, by reference to their text and context.

10 That task finds its place in the context of the law of insolvency (personal and corporate) as it has existed in this country since at least Federation.

11 Bankruptcy, at least since the passing of the *Bankruptcy Act 1924* (Cth) (the **1924 Act**) has been a matter of federal jurisdiction. As such, until 1988, “the common law of England” was directly applicable under s 80 of the *Judiciary Act 1903* (Cth), until Act No 120 of 1988 replaced that phrase by “the common law in Australia”.

12 Until the 1992 Act, the companies and corporations legislation of States, Territories and the Commonwealth incorporated relevant provisions of the 1924 Act and the *Bankruptcy Act 1966* (Cth) (the **1966 Act**): see ss 291–293 of the Companies Acts 1961; ss 438, 441 and 451 of the Companies Codes 1981; and ss 553 and 565 of the *Corporations Law*; and for the position in England see s 164 of the *Companies Act 1862* (UK), s 207 of the *Companies (Consolidation) Act 1908* (UK), s 317 of the *Companies Act 1948* (UK) and the modernisation of personal and corporate insolvency in the *Insolvency Act 1986* (UK), relevantly involving ss 107, 239, 323 and 328.

13 These considerations made bankruptcy conceptions and authorities in both England and Australia relevant to the understanding and the operation of corporate insolvency.

14 The 1992 Act removed the adoption of bankruptcy provisions *mutatis mutandis* into companies legislation, and introduced specific provisions concerned with proof and ranking of claims: Div 6 of Pt 5.6 (where s 553C sits), and with recovery of property or compensation for the benefit of creditors of an insolvent company: Pt 5.7B (where s 588FA sits). This gave effect to the recommendation of the Australian Law Reform Commission’s General Insolvency Inquiry (Report 45 of 1988), led by the Commissioner-in-Charge, the distinguished insolvency practitioner, Mr Ron Harmer, and other distinguished Commissioners, Mr Richard Fisher, Professor David Kelly, Sir Maurice Byers and Professor Michael Chesterman (the **Harmer Report**).

15 Whilst the starting point in the task of statutory construction is the text of the provision, that takes one immediately in this case to historical legal context. This is so because of the repetition in s 553C of text and structure familiar for over a century, and because of the need to understand not only the accepted interpretation of the predecessor provisions to s 553C, but also the manner of operation of preference provisions for over a century to place the text and structure of s 588FA, the other relevant provisions of Pt 5.7B such as s 588FF in particular, and s 553C into their proper legal context. The similarity in the relevant set-off provisions can be seen in the relevant sections below.

16 Section 553C is in the following terms:

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

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

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

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

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

17 Section 86 of the 1966 Act is in the following terms:

(1) Subject to this section, where there have been mutual credits, mutual debts or other mutual dealings between a person who has become a bankrupt and a person claiming to prove a debt in the bankruptcy:

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

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

(c) only the balance of the account may be claimed in the bankruptcy, or is payable to the trustee in the bankruptcy, as the case may be.

(2) A person is not entitled under this section to claim the benefit of a set‑off if, at the time of giving credit to the person who has become a bankrupt or at the time of receiving credit from that person, he or she had notice of an available act of bankruptcy committed by that person.

18 Section 82 of the 1924 Act was in the following terms:

Where there have been mutual credits, mutual debts, or other mutual dealings between a bankrupt and any person proving or claiming to prove a debt in the bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings; and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively:

Provided that no person shall be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor or at the time of receiving credit from the debtor, notice of an available act of bankruptcy.

19 Section 31of the *Bankruptcy Act 1914* (UK) (the **1914 UK Act**) was in the following terms:

Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively ….

20 Section 38 of the *Bankruptcy Act 1883* (UK) (the **1883 UK Act**) as in the following terms:

Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him.

21 The question of the meaning to be ascribed to s 553C also depends contextually, in part, upon the relationship of the predecessor set-off provisions to the preference action and preference provisions, at relevant times, and also the other actions for the benefit of the estate of the insolvent person or company, being up to 1992, recognised by the phrases “voluntary settlements” (s 120 of the 1966 Act) and fraudulent dispositions (s 121 of the 1966 Act), as well as the provision concerning execution or attachment (s 118 of the 1966 Act).

22 The liquidator denies that a creditor liable to repay or disgorge a preference can avail itself of the set-off in s 553C. To the extent that a series of cases in this country can be seen to support such a right they were, it was submitted by the liquidator, wrongly decided.

23 The liquidator’s argument was founded on six propositions: *First*, the text and structure of the provisions and the Act disclose different spheres of operation for s 553C and s 588FA. *Secondly*, the statutory purpose of the preference provision (s 588FA) would be undermined by allowing the set-off under s 553C. *Thirdly*, the accepted approach prior to 1992 in England and Australia was that there could be no set-off of a debt owed by a company in liquidation or bankrupt to a creditor against a liability of the creditor to repay or disgorge a preference. *Fourthly*, the extrinsic materials for the 1992 Act, most importantly the Harmer Report itself, do not suggest any change to that pre-existing position.  *Fifthly*, there is an absence of mutuality between the liquidator and the creditor. *Sixthly*, the requirement under s 553C that mutual obligations exist before the relevant date cannot be satisfied.

24 The third and fifth (the fifth being related to the sixth) of these propositions require an examination of a number of cases, English and Australian, before 1992. The creditor directly challenged these two propositions as involving, and being based on, an oversimplified reading of earlier important cases. It is appropriate to commence with an examination of the validity of these two propositions. The resolution of them is central to the answering of the question in the special case.

25 Before examining these propositions through the cases, it is appropriate to make a number of introductory comments.

## Introductory comments

26 First, s 553C (as did its predecessor provisions) works as a form of statutorily imposed accounting that is part of the ascertainment of the proof of debt. Thus, conceptions relevant to what can be proved under, for instance s 82 of the 1966 Act, are also necessarily relevant to the operation of s 86 of the 1966 Act.

27 Secondly, the 1883 UK Act restated the law of bankruptcy. Its framework continued in the modern law, providing for proof of pre-bankruptcy debts (s 37), the creation of statutory rights of set-off (s 38), the distribution of assets *pari passu* (s 40), and the avoidance of fraudulent preferences (s 48). With the important exception of the objective nature of the preference in Australian law, the 1924 Act and the 1966 Act adopted a similar framework to the 1883 UK Act: proof of debt (s 81 in the 1924 Act and s 82 in the 1966 Act), set-off (s 82 and s 86), *pari passu* distribution (s 89 and s 108) and preferences (s 95 and s 122).

28 Thirdly, the conceptions of mutual set-off and *pari passu* distribution are both founded in equity. The former is often expressed as an exception to the latter (see Goode RM *Principles of Corporate Insolvency Law* (2nd ed, Sweet & Maxwell, 1997) at 153–154 and 172–173). At the foundation of each is equity’s concern with justice and fairness. In relation to the former, the injustice to the creditor of not recognising *genuine* mutual debts and credits and mutual dealings between the creditor and the debtor in ascertaining the respective rights and obligations of the insolvent debtor and the creditor. In relation to the latter, equity is concerned with equality of distribution, as a reflection of the equitable maxim “Equity is equality”: see *Akers as a joint foreign representative of Saad Investments Company Limited (in Official Liquidation) v Deputy Commissioner of Taxation* [2014] FCAFC 57; 223 FCR 57 at 41 [135]. The two manifestations of equity’s concern with fairness are directed to two different, but related, aspects of the insolvent administration: fairness in the ascertainment of the assets of and claims upon the estate; and fairness in the equal access to that estate amongst ranking unsecured creditors for their ascertained or accepted claims.

29 Fourthly, the statutory purpose of the avoidance or conclusion of voidableness of preferences, and of the preference action is the just remedying of dislocation of the equality of creditors reflected in *pari passu* distribution. The purpose was expressed by Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ in *G & M Aldridge Pty Ltd v Walsh* [2001] HCA 27; 203 CLR 662 at 674–675 [29] and [30] in a two-fold form, drawn in part by adoption of what had been said by the United States Supreme Court in *Union Bank v Wolas* 502 US 151 (1991) at 161: The primary objective is the securing of equality of distribution amongst creditors of the same class; with the consequential purpose of deterring the “race to the courthouse” (put by the Supreme Court: “to dismember the debtor during his slide into bankruptcy”) and thereby enhancing the prospect of debtors trading out of difficulty.

30 Fifthly, the object of the statutory set-off was expressed by Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ in *Gye v McIntyre* [1991] HCA 60; 171 CLR 609 at 618–619, being to prevent injustice and to do substantial justice where “a debt is really due from the bankrupt to the debtor to his estate”. Provisions such as s 553C (s 86 of the 1966 Act) are to be given “the widest possible scope”: *Day & Dent Constructions v North Australian Properties Pty Ltd (Provisional Liquidator Appointed)* [1982] HCA 20; 150 CLR 85 at 108 and *Gye v McIntyre* at 619, as long as it be recognised that that width and the “substantial justice” is confined within the limits of *genuine* mutuality as a matter of substance: *Day & Dent Constructions* at 95 and *Gye v McIntyre* at 619. The construction and application of set-off provisions such as s 553C is to be approached in the context of these underlying values that is reflected in the binding legal principles of the authorities.

31 Sixthly, the practical effect of the correctness of the creditor’s position in this case should be acknowledged at the outset. The creditor does not seek to invoke s 553C to set off the debts the very subject of the asserted preference payments. The creditor accepts that that would entirely defeat the statutory purpose of the preference provision by the circularity involved. Circularity is an anodyne way of expressing the absurdity of the proposition that would strip the preference provision and action of *all* its utility and effect. The creditor submits, however, that it is legitimate to set off another debt owed by the company in liquidation to the same creditor and such falls within, and has always fallen within, the purview of s 553C and predecessor provisions in bankruptcy statutes. The consequences of the correctness of that proposition are as follows: If a creditor had two debts each of $100, and it was preferred as to one in full, it cannot set off the underlying debt in respect of which it was preferred against the obligation to disgorge the preferred payment of $100, but it can set off the obligation to disgorge against the other debt of $100. Thereby, it receives at least 50 cents in the dollar from the administration. This return on these hypothesised facts (though not strictly a dividend and which may, depending on arguments later considered, be supplemented by the value of the proof for the other $100) would be irrespective of what assets remain for all other creditors, of the extent of the insolvency, and of the *pari passu* distribution amongst the other creditors. In other words, the preferred creditor’s effective position can be seen by the operation of s 553C and as an effective “distribution” by reference to the size of its debts and the size of its preferred payment for which it has a liability to disgorge and not from the overall position of the insolvent company, the insolvent estate of the company, and the claims of all creditors. Not only would funds from the repayment or disgorgement of a preference not be available to contribute equally to other ranking unsecured creditors (otherwise than by the reduction of the creditor’s proof by operation of s 553C), but also the funds would not be available to contribute to priority creditors such as employees, or to the costs of the administration. This unavailability of the funds comprising the disgorgement of the preference to fund a distribution to priority creditors effectively means that an erstwhile preferred (likely non-priority) creditor gains access to preference recovery funds in priority to priority creditors, by operation of s 553C, a statutory provision built on equitable notions of mutuality and reciprocity, and fairness. On the other hand, if the creditor disgorged the preference in full and so restored the estate to the position in which it would have been had the preferential transaction not occurred, and was entitled thereafter to prove for both its debts, that is for the full $200, it might be thought that any dislocation of what would have been the distribution of the estate amongst all the creditors (including the preferred creditor) would have been remedied, and priority creditors and the liquidator would have available the full amount of the disgorgement for their claims and for the costs of the administration.

32 Seventhly, if the creditor’s position be correct there appears to be an affectation of the equality of distribution by mutuality encompassing the very obligation to remedy the transaction that infringed that equitable principle; whereas if the liquidator’s position be correct and mutuality does not encompass the obligation to remedy the preference the creditor is put into the very same position in which it would have been had it not been preferred by a transaction that was contrary to the statute and contrary to the underlying equitable principle of equality.

33 Whether or not s 553C permits this course proposed by the creditor is the question at hand. As the Court said in *Gye v McIntyre* at 619, protection against abuse of the section (s 553C) is provided for in subs 553C(2), and the requirement of mutuality at the relevant date.

## The legal context in 1992 of s 553C

### The nature of a preference and its recovery

34 Before turning to the relationship between set-off and preference, it is necessary to be clear as to the effect of a preference, the nature of the preference action, and the consequences of the success of such an action in Australian insolvency law.

35 In *Burns v Stapleton* [1959] HCA 34; 102 CLR 97 at 104, Dixon CJ, Kitto and Windeyer JJ pointed out that s 95(1) of the 1924 Act did not avoid instruments, but rather it avoided certain kinds of changes in the legal situation of the insolvent person. It made void, if it applied, the change which, if allowed to be effectual, would dislocate the statutory order of distribution amongst the creditors. That expression of the matter is to be understood in the light of what Dixon CJ, Fullagar, Kitto and Taylor JJ had said three years earlier in *Federal Commissioner of Taxation v Jaques* [1956] HCA 40; 95 CLR 223 about the nature of s 95(1) of the 1924 Act. The question in issue there was whether s 95 was a provision contemplated within s 5(3) of the 1924 Act dealing with provisions binding the Crown. In dealing with this question their Honours said at 229–230:

Even on this broad construction, however, s 95(1) cannot be held to relate to such remedies, for it stands apart from the provisions which provide for the divesting of property from a debtor on his becoming a bankrupt and for matters incidental to the divesting, and it does not affect any remedies which, but for the Act, might have been pursued against the debtor’s property. It relates, indeed, to property, money, obligations and judicial proceedings which, it assumes, would otherwise be valid and therefore immune from attack by means of any remedy provided by law. And it does not concern itself with creating any remedy. It simply renders certain transactions void as against the trustee, leaving the general law or other statutory provisions to supply appropriate remedies for the situations thus created. Its operation in respect of a payment to a creditor (and for present purposes the other kinds of transactions to which it applies may be ignored) is to make the payment, as against the trustee void as a payment, so that, in favour of the trustee, the creditor must be considered to have received money which belongs to the bankrupt’s estate, and his debt must be considered not to have been paid. The trustee’s remedies are to sue for the recovery of the money as money had and received to his use, which is a remedy provided by the common law, … or to apply to the Bankruptcy Court for an order for repayment, which is a remedy provided by s 25... The creditor, on the other hand, is remitted to the only remedy which he would have had if the payment had not been made, namely to prove in the bankruptcy...

It may be thought to be a question whether s 95(1) is not one of the provisions of the Act “relating to the priorities of debts”. It is true that it is not included in the group of sections by which the Act prescribes the order of priorities to be observed by the trustee in the application of the estate of a bankrupt, namely ss 84, 85, 86, 87, 88A and 89 in Div. 2 of Pt. VI. It is, however, in the nature of a corollary to those sections, in the sense that it is directed to ensuring that the administration of a bankrupt’s estate in accordance with them shall not be prevented by any conveyance, transfer, charge, payment, obligation or judicial proceeding, occurring within six months before the presentation of the petition and not possessing certain saving characteristics, which, if it were allowed to be effective, would put a debt ahead of the place appropriate to it in the prescribed order. Its operation, so far as payments are concerned, is to “prevent a payment to anybody who, but for such payment, would share in the administration of the bankrupt’s estate”, that is to say “any person who, at the date of the payment to him, would have had to come in and prove and rank with the other creditors in the bankruptcy”...The section is therefore analogous in its purpose to the old rule which invalidated a fraudulent preference on the ground that if it were permitted to stand “the policy of the bankruptcy laws would be defeated” … and to the provision now in force in England under s 44 of the *Bankruptcy Act* 1914 which has been described as invalidating such a preference as “a fraud upon the administration in bankruptcy”…

[footnotes omitted]

36 In *Commissioner of Taxation v Lane* [2020] FCAFC 184; 385 ALR 92 I said (with the agreement of Perram and Farrell JJ) the following at 140 [134] about *Jaques* and the preference provision (s 122 of the 1966 Act):

The following is to be noted about the text of s 122 and about these passages from *Jaques*: First, the avoidance is *as against the trustee*. Secondly, **its operation in respect of a payment is to make the payment void as a payment so that, in favour of the trustee, the creditor is to be considered as having received money which is part of the bankrupt’s estate, and the creditor’s debt is considered not paid.** Thirdly, the trustee in bankruptcy’s remedies as to monetary recovery include: a suit at common law, for moneys had and received (now in restitution) or an order for payment under the *Bankruptcy Act* (s 25 under the 1924 Act, s 30 under the 1966 Act). Fourthly, that the avoidance is as against the trustee in bankruptcy (not generally or as against the debtor, now bankrupt) means that the sequestration order marks the event to which the section speaks and the date of commencement of the bankruptcy marks the earliest time from which the avoidance operates: *Williams v Lloyd* at 374; and *Re Fiorino;* *Fiorino v Woodgate* [1994] FCA 181 at [42]. Fifthly**, the provision does not provide for avoidance entitling the debtor to sue to recover the payment to which the trustee in bankruptcy succeeds by force of s 58. Rather, it is the trustee’s common law action because, by force of the statute and the making of the payment void as against the trustee in bankruptcy, the creditor is to be treated as having received money which belonged and belongs to the estate of the bankrupt. The trustee in bankruptcy would be the plaintiff in the action, not because he or she succeeded a right of action of the debtor (now bankrupt), but because the operation of the section treats the creditor as having received property of the bankrupt estate administered by the trustee in bankruptcy.** In any event, an order could also be made under the *Bankruptcy Act*to pay to the trustee in bankruptcy moneys representing money belonging to the bankrupt’s estate. Sixthly, the creditor is remitted to the remedy that it had: to prove in the bankruptcy. Seventhly, **the purpose of the section is to ensure that the administration of the estate takes place in the order prescribed by the *Bankruptcy Act* and that the payment not dislocate the working of the statute**: in the language referable to the notion of the fraudulent preference – to avoid a fraud on the administration of the bankruptcy.

[emphasis added]

37 As shall be seen, the drafting of the unfair preference provisions in the 1992 Act did not use the expression “void against the liquidator”. Nevertheless, the notion that, as against the liquidator in the preference action, the payment is to be seen as having been made from the assets of the estate of the insolvent company is important in appreciating the proper character of the obligation to disgorge the preference and of the funds received by the company upon such disgorgement.

38 One further point relevant to the stated case should be made about *Jaques* and the preference provision. Their Honours in *Jaques* thought s 95 of the 1924 Act to be “in the nature of a corollary” to ss 84, 85, 86, 87, 88A and 89 of the 1924 Act prescribing the order of priorities.

39 The notion of “void against the trustee [or liquidator]” has a long provenance. Chief Justice Dixon and Fullagar J discussed it in the context of the Statute of Elizabeth in *Brady v Stapleton* [1952] HCA 62; 88 CLR 322 at 332–335. Fraudulent assignments were *valid* until a creditor intervened by levying execution or commencing legal proceedings. Void was void *sub modo*, that is, void under a qualification or condition. The transaction took effect until another creditor acted. Title passed, if there were title to give. Likewise, preferences were effective payment until a trustee or liquidator elected to set them aside: *NA Kratzmann Pty Ltd (in liq) v Tucker, Liquidator of Reed Murray Developments Qld Pty Ltd (No 1)* [1966] HCA 72; 123 CLR 257 at 277; and *Starkey (as liq of Allan Fitzgerald Pty Ltd (in liq)) v Deputy Commissioner of Taxation* [1994] 1 Qd R 142 at 152 (***Re Starkey***).

40 In *Williams v Lloyd* [1934] HCA 1; 50 CLR 341, in the context of settlements under s 94 of the 1924 Act (voluntary settlements), Dixon J said the following at 374:

… Sec 94(1) does not avoid the entire transaction for all purposes. It makes the “settlement” void against the trustee in the bankruptcy. Such a provision means voidable at the instance of the trustee as from the time as at which his title accrues … It invalidates the “settlement” only “against the trustee”, which means for the purpose of letting in his claim; in order that his demand may be given effect to … In all other respects and after the demands of the trustee have been satisfied, the settlement stands…

[footnotes omitted]

41 See also *Lane* 385 ALR at 139 [131] and *Re Trustee of the Property of O’Halloran* [2002] FCA 1305 at [76] and the other authorities there cited.

42 The present relevance of these considerations is that the statute prior to 1992 (such as ss 120, 121 and 122 in the 1966 Act) provided for an avoidance against, and at the election of, the trustee or liquidator, not in right of the debtor, now bankrupt or in liquidation. Subject to the rights of the trustee or liquidator created by the avoidance against him or her, the payment or disposition under s 95 or s 122 was valid to extinguish the debt as between debtor and creditor. The action for recovery or disgorgement was either at common law at the suit of the trustee or liquidator for money had and received or at the suit of the trustee in bankruptcy under s 25 of the 1924 Act or s 30 of the 1966 Act. (Now, the action is under s 588FF, also at the suit of the liquidator.) The right to recover was not of the erstwhile debtor; the right to recover did not represent property (by way of any right or equity, vested or contingent) capable of vesting under s 58 of the 1966 Act; (subject to the circumstance of the recovery of identifiable property: see [44] below) the moneys recovered did not fall into any valid pre-existing security as property of the bankrupt or company in liquidation secured by any such charge; (subject to the above exception) the action inured for the benefit of all creditors for the purposes, and under the terms, of the relevant bankruptcy or companies legislation administered by the trustee in bankruptcy or the liquidator. I will return to the nature of the right of action under s 588FF of the Act and to the question of the character of the funds received by the company pursuant to an order under s 588FF.

43 In *NA Kratzmann Pty Ltd (in liq) v Tucker, Liquidator of Reed Murray Developments Qld Pty Ltd (No 2)* [1968] HCA 44; 123 CLR 295, the Court (McTiernan, Taylor and Menzies JJ) considered the proper order to make in a successful preference action pursuant to s 293 of the *Companies Act 1961* (Qld) invoking s 95 of the 1924 Act. Both the debtor company and the preferred creditor company were in liquidation at the time of the declaration. The debtor company was entitled to prove in the liquidation of the preferred company for the amount of the preference; and the preferred company was not entitled to prove in the liquidation of the erstwhile debtor company for the underlying debt until the preference was repaid in full. The Court referred with approval to what Chief Justice Barwick had said in *NA Kratzmann Pty Ltd v Tucker (No 1)* [1966] HCA 72; 123 CLR 257 at 285 as to the liquidator’s right to maintain the action for moneys had and received. In approving (with one irrelevant qualification) the judgment of Bennett J in *Re Yagerphone Ltd* [1935] 1 Ch 392, the Court in *Kratzmann (No 2)* made clear that the moneys recovered are not the same moneys as paid to constitute the preference, and are not moneys of the bankrupt or company subject to the pre-existing charge, nor did the title of the trustee to them come by succeeding to any title the bankrupt had. The Court endorsed the observations of Russell LJ in *N W Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 1 WLR 1324 at 1338 that concerned *Re Yagerphone*, as follows:

… that a claim by the liquidator for repayment to him of a fraudulent preference was not subject to the debenture-holder’s charge: a statutory right in and only in the liquidator to make such a claim could never have been property of the company the subject to the charge.

44 That the position would be different in respect of the recovery of identifiable property (see *Kratzmann (No 2)* at 301–302) does not affect the relevant point that the right of recovery is the trustee’s or liquidator’s to recover money or property for the benefit of the creditors according to the statutory regime. If the property is identifiable as a matter of tracing it may still fall within an earlier security which had attached, at least prior to the preference, in which case the trustee or liquidator is unlikely to expend funds of the estate on such a recovery action.

### The nature of mutuality

45 The nature and limits of the notion of mutuality are to be taken principally from the decisions of the High Court in *Hiley v People’s Prudential Assurance Co Ltd* [1938] HCA 40; 60 CLR 468; *Day & Dent Constructions* 150 CLR 85; and *Gye v McIntyre* 171 CLR 609.

46 The creditor emphasised the width of the concept of mutuality. The phrase “the widest possible scope” was used in *Day & Dent Constructions* at 108 and approved in *Gye v McIntyre* at 619. The creditor relied on *Hiley*’s case as founding a contingency sufficient for the notion of mutuality of dealings. In *Hiley*, a policy holder (the appellant, Mr Hiley) borrowed money from his life company giving a registered mortgage over certain land and depositing his life insurance policy as security. The life company transferred the mortgage along with other similar mortgages to a lender to it, which lender itself transferred the mortgage by way of security to a bank. The life company was later wound up. Its liquidator informed the policy holder that it would not carry out its obligations to him under the policy thereby repudiating it. After liquidation, when the bank sued the policy holder for the mortgage debt, a dispute arose about the validity of the transfers of the mortgages on the ground that the transfers by the life company were *ultra vires*. The policy holder sought to set off against the mortgage debt his right to damages for repudiation of the policy by the life company. This, of course, was not possible if only the bank was entitled to recover the mortgage debt. The dispute was settled and some of the policies (relevantly including that of the appellant) were re-transferred to the life company by the bank. The question in issue was whether the policy holder was entitled, at the date of liquidation of the life company, to set off his right to damages for repudiation of the policy against the debt under the mortgage, now that the policy had been reinstated to the life company. In concluding that there was relevant mutuality at the time of the commencement of the liquidation, Rich J said, at 60 CLR 487, that the answer to whether or not there was mutuality was to be gained by ascertaining the rights by reference to “the natural outcome of previous transactions”, citing *In re Daintrey; Ex parte Mant* [1900] 1 QB 546 at 568. Justice Rich said, again referring to *In re Daintrey*, that there was no need for there to be existing claims at the relevant time. Rather, Rich J said at 487:

**Rights must be vested in the creditor and in the company** which, without any new transaction, grow in the natural course of events into money claims capable of forming items in an account or capable of settlement by set-off.

[emphasis added]

47 Thus, the right to set aside the mortgage was the product of the right or equity (of the life company) vested in it at the time of liquidation. The policy holder was thus, at the relevant time so as to support the claim for mutuality, to be taken as indirectly liable to the life company (albeit apparently directly to the bank) for the mortgage debt.

48 Justice Starke said at 490 that the dealings “would end in a monetary claim” and at 492 said that the life company was always entitled in equity to the benefit of the mortgage and to the debt secured by it.

49 Justice Dixon at 496–497 rejected the proposition that there was a new claim by the liquidator against the bank. He made, relevantly, three points. First, there was no need for enforceable debts. Rather, he said at 496–497:

… the general rule does not require that at the moment when the winding up commences there shall be two enforceable debts, a debt provable in the liquidation and a debt enforceable by the liquidator against the creditor claiming to prove. It is enough that at the commencement of the winding **up mutual dealings exist which involve rights and obligations whether absolute or contingent of such a nature that afterwards in the events that happen they mature or develop into pecuniary demands capable of set off**. If the end contemplated by the transaction is a claim sounding in money so that, in the phrase employed in the cases, it is commensurable with the cross-demand, no more is required than that at the commencement of the winding up liabilities shall have been contracted by the company and the other party respectively from which cross money claims accrue during the course of the winding up...

[emphasis added; footnotes omitted]

50 Secondly, at 497, he said that the matter was not one of form but of substance:

In the second place, the equitable or beneficial interest of the parties in the mutual debts, credits or dealings must be considered and not merely the dry legal right. A set-off will be allowed between a debt owing by C to a liquidating company and a debt owing by it to B, if B as creditor holds the chose in action as bare trustee for C. Correspondingly, a set-off will be refused between a debt owing by B to a liquidating company and a debt owing by it to B, if B as creditor hold the chose in action as bare trustee for C …

[footnotes omitted]

51 Thirdly, at 498, Dixon J expressed the nature of the contingency in that case in a manner important for the resolution of the arguments of the creditor in this case:

In the present case, at the commencement of the winding up the respondent company no longer had the unencumbered ownership of the mortgage debt owing by Hiley. But **it was at least entitled to an equity of redemption in that debt**, which, under the registration system, was vested at law in the bank. This means that **in equity the company was considered owner of Hiley’s mortgage debt,** subject, however, to the debt or liability for which the bank held it as security and any further amount for which the Federal Building Assurance Co. Ltd. was entitled to hold the mortgage as security. Moreover, there existed a claim to set aside or treat as void or voidable the transfers of the mortgage from the respondent company to the Federal Building Assurance Co. Ltd. and from the latter company to the bank. This claim had not been propounded at the time but all the elements upon which it was afterwards based existed at the time when the winding up commenced.

[emphasis added]

52 Further to this, at 499–500, Dixon J summed up the position before the Court in *Hiley*:

The question in this case is, in my opinion, **whether when in virtue of rights or claims subsisting at the commencement of the winding up**, the liquidator gets in the interest antecedently transferred by the company, that is, accordingly as it may be regarded, when he clears off the encumbrance or substantiates in part by way of compromise the disputed claim the transfer was invalid, **the interest so got in** becomes subject to the rights of set-off to which it must have been subject, had it been continuously vested in the company.

In my opinion the answer is that the entire amount of the mortgage becomes subject to the statutory right of set-off. All the respondent company’s rights in relation to the mortgage arise out of and **are referable to the rights subsisting at the time when the winding up began.** It pursued or prosecuted whatever rights then belonged to it with the result that it obtained a right to call for an unencumbered legal title to the mortgage to which, unless the transfers or one of them were in truth invalid, it was entitled, on liquidation, only in equity subject to encumbrances. But this was **the consequence of pursuing rights subsisting at that time** and involved no new and independent transaction. Standing as the liquidator did upon claims forming part of the assets he was appointed to administer, he cannot assert a fresh and independent title to the asset got in so as to free it from the disability or disadvantage of set-off to which, if it formed part of those assets, it must be subject. …

[emphasis added]

53 The relevant right or equity and the relevant obligation which later grow into a claim or debt must be in existence as at the relevant date. The right or equity or obligation may be absolute or contingent. The call by Dixon J to have regard to the equitable or beneficial interest reflects the equitable character of the conception of the set-off embodied in the statutory provision. Equity long had a role in the administration and operation of bankruptcy and in aid and furtherance of the equitable conceptions and values that underpinned insolvency and bankruptcy: Holdsworth W, *A History of English Law* (2nd ed, Methuen and Co Sweet and Maxwell, 1971) volume 1 at 470–473, volume 8 at 241–244, and volume 12 at 281–283 and 541–542; May HW and Edwards WD (ed), *The* *Law of Fraudulent and Voluntary Conveyances* (3rd ed, Steven and Haynes, 1908) at 306–307; *In re Mouat; Kingston Cotton Mills Co v Mouat* [1899] 1 Ch 831.

54 It was said by the creditor here that there were mutual dealings between the two companies reflected in the case stated: goods supplied by the creditor leading to two debts of the company in liquidation, one being paid by the preferential payment. It was submitted that the right to recover the preference was contingent in the sense discussed in *Hiley*’s case, as the natural course of events if a liquidator were to be appointed or the circumstances were of such a nature that in the events that happened the dealings matured into pecuniary demands by the liquidator on behalf of the company in liquidation; that the claim is of the company in substance beneficially by the order to pay the company; and that the right of the liquidator was the dry legal right held for the benefit of the company.

55 It is the legitimacy of these submissions upon which the answer to the question reserved turns. It is to be answered by the reference to the text, structure and purpose of the statutory provisions. For the reasons later discussed, those submissions which were the core of the creditor’s argument, should be rejected.

56 In *Day & Dent Constructions* 150 CLR 85, Day & Dent (**D & D**)applied to borrow $100,000 from a finance company (**Esanda**) and requested it to direct the money to another company, North Australian Properties Pty Ltd (**NAP**). Esanda did so, taking security from D & D and NAP, both being borrowers, but NAP also guaranteeing payment by D & D. In due course D & D went into liquidation. Esanda made demand on NAP which repaid the $100,000. The liquidator of D & D sought repayment from NAP of the loan of $100,000 that D & D had made to NAP. The issue was whether the $100,000 payment by NAP to Esanda (after D & D’s liquidation) could be set off against the debt of $100,000 of NAP to D & D, or whether NAP had to repay the $100,000 loan and prove for the $100,000 payment to Esanda under the guarantee in D & D’s liquidation. After referring to *Hiley*’s case, Gibbs CJ (with whom Stephen J agreed) said at 91 that the principle was that “it is enough at the date of liquidation [that] there existed on the one hand a debt and on the other hand a liability which in due course might mature into a debt”. Justice Mason referred to *Hiley*’s case and in explanation of the principle referred at 103–104 to what Byles and Montague Smith JJ had said in *Naoroji v Chartered Bank of India* (1868) LR 3 CP 444 (a case cited by Dixon J in *Hiley*), as follows:

In support of this proposition Dixon J. cited *Naoroji v. Chartered Bank of India* (1868) LR 3 CP 444, at pp 451-452 ; *Astley v. Gurney* (1869) LR 4 CP 714 ; *Palmer v. Day* *& Sons* (1895) 2 QB 618, at p 622 ; and *Daintrey* (1900) 1 QB, at pp 568, 574. Sheppard J. in the Full Court thought that these cases did not stand for the proposition for which they were cited. Again his Honour sought to distinguish them as dealing with claims involving fixed, as opposed to contingent, liabilities. He referred to constant references in the judgments in *Naoroji*, Astley and Palmer to the fact that the claims in question "must", rather than may, have resulted in a debt.

What was meant by these statements is, I think, illustrated by the remarks of Byles and Montague Smith JJ. in *Naoroji*, Byles J. said (1868) LR 3 CP, at p 451:

Mutual credits I conceive to mean simply reciprocal demands which must naturally terminate in a debt. It seems to me that the transaction described in this case *would naturally* terminate in a debt. (Emphasis supplied.)

Montague Smith J. (1868) LR 3 CP, at p 452 said:

The object of the enactment seems to me to have been, that, where merchants have had mutual dealings, each giving credit to the other, relying upon each other's solvency, in the event of the bankruptcy of one of them, the account shall be taken between them of all such credits and dealings *as in the natural course of business would end in debts*, and the balance shall be the debt due from the one to the other.

57 Justice Mason at 104 recognised that Dixon J in *Hiley* extended the principle to contingent liabilities.

58 *Gye v McIntyre* 171 CLR at 618–620 reinforced the authority of *Hiley*’s case and *Day & Dent*. At 623–624 the Court said:

In the context of s.86, the word "mutual" conveys the notion of reciprocity rather than that of correspondence. It does not mean "identical" or "the same". So understood, there are three aspects of the section's requirement of mutuality. **The first is that the credits, the debts, or the claims arising from other dealings be between the same persons. The second is that the benefit or burden of them lie in the same interests. In determining whether credits, debts or claims arising from other dealings are between the same persons and in the same interests, it is the equitable or beneficial interests of the parties which must be considered.** … **The third requirement of mutuality is that the credits, debts, or claims arising from other dealings must be commensurable for the purposes of set-off under the section**. That means that they must ultimately sound in money.

The requirement that the credits, the debts or the claims arising from other dealings be commensurable does not mean they must be vested, liquidated or enforceable at the decisive date, that is to say, at the time of the sequestration order or special resolution accepting the composition. **Provided they exist as contingent at that date and are of a kind which will ultimately mature into pecuniary demands susceptible of set-off**, the requirement of the section may be satisfied in relation to them. In so far as "dealings" are concerned, Dixon J. pointed out in *Hiley*:

"It is enough that at the commencement of the winding up mutual dealings exist which involve rights and obligations whether absolute or contingent of such a nature that afterwards in the events that happen they mature or develop into pecuniary demands capable of set off. If the end contemplated by the transaction is a claim sounding in money so that, in the phrase employed in the cases, it is commensurable with the cross-demand, no more is required than that at the commencement of the winding up liabilities shall have been contracted by the company and the other party respectively from which cross money claims accrue during the course of the winding up.”

[emphasis added]

59 Thus, from *Hiley*, *Day & Dent* and *Gye v McIntyre* the requirements of the provision are: the absolute or contingent rights or equities or obligations from the mutual dealings that give rise to the credits, debts or claims must be between the same parties and in the same interests in the sense of the equitable or beneficial interests; and they must exist at the relevant date.

60 Section 553C is concerned with what is to be proved in the insolvent estate: see s 553C(1)(c). That is why it sits within Div 6 of Pt 5.6. Under s 553(1) provable debts (relevantly, any balance owed to the creditor after set-off under s 553C) are “all debts payable by, and all claims against, the company … the circumstances giving rise to which occurred *before the relevant* *date*”. Thus the binding connection between s 553 and s 553C means that the phrase “at the relevant date” must be understood as before the relevant date. This is the position in bankruptcy: *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; 234 CLR 52 at 58 [10].

### Authorities before 1992 concerning set-off and claims by trustees and liquidators

61 It is uncontroversial that set-off is available in respect of a right which the trustee or liquidator can pursue in an action, or in other proceedings where the right being enforced by the trustee or liquidator is one of the bankrupt or of the company in liquidation.: see *In re Daintrey* at 549 referred to by the Court in *Gye v McIntyre* 171 CLR at 621. Thus, a claim by the trustee to which he or she succeeded by s 58 of the 1966 Act which was a claim of the debtor against the creditor or a claim of the company against the creditor which the liquidator brings, is to be taken as set off, if in the same interest, against a claim of the creditor against the bankrupt or insolvent company.

62 *Re Washington Diamond Mining Company* [1893] 3 Ch 95 was strongly relied upon by the creditor. A director held partly paid up shares. His director’s fees were unpaid. The company was in “embarrassed” circumstances. On a day when the company had barely over £2 in the bank the director gave it a cheque for £70 to pay up his shares and took a cheque for £70 for his fees. The company was shortly thereafter wound up. The liquidator sought recovery of the £70 as a fraudulent preference. Sections 38(7) and 101 of the *Companies Act 1883* (UK) prevented any set-off against calls on the winding up of the company. (For the present position in Australia, see s 553A of the Act.) At first instance, Vaughan Williams J refused to draw the necessary inference that there was an intention to prefer (the mental element absent from the Australian provision). It is important to recognise that under the 1883 Act the preference was fraudulent and void against the trustee, if it was made “with a view of giving such creditor a preference”. The effect of dislocation of the *pari passu* distribution, and so injury to other creditors, was assumed by the statute if the mental state was present. Lord Justice Lindley on appeal (with whom Bowen LJ concurred) comfortably drew that inference, saying at 109–110:

It is clear enough what each of the transactions impeached in truth was. It was an attempt by these directors to pay up their shares in full without really parting with any money. I will assume that each of them owed the company £70 in respect of his shares, but the company owed him £70 for fees. If the company could have paid him his fees, and had paid them, he could have applied the money so paid to him in paying up his shares, and all would have been well. So, if the company had had the money with which to pay him his fees, the cases shew that it would have been unnecessary to go through the form of paying him for them by a cheque, and taking back the same cheque, or another of the same amount, for the sum due from him on his shares. If the company had had the cash with whichto pay him his fees, an assent to set them off against what he owed the company, and a set-off accordingly would be equivalent to a payment in cash of each of the cross-demands: see *Spargo's Case*. Although even then a question of fraudulent preference might arise if the company were wound up in three months. But in this case the company had no means whatever of paying Mr. *M'Keand* or Colonel *Underwood* his fees, unless he furnished the funds by first paying up his shares. Each of them accordingly did so. He paid them up in cash; but then the money he paid to the company became the company's money, and he was a mere creditor of the company for his fees. He was not entitled to be paid those fees in preference to any other creditor, but he and his co-directors pay him in full when they know that *Farmer* is pressing, and that the non-payment of the royalties jeopardizes the property of the company, and that the company has not a sixpence available to pay any of its debts. The circumstances are such as to drive me to the conclusion that Mr. *M'Keand* and his co-directors acting for the company made these payments of £70 to Mr. *M'Keand* and Colonel *Underwood* deliberately to give them a preference over the other creditors of the company, and thereby to refund to them the £70 which they had paid the moment before in respect of their shares.

[footnotes omitted]

63 His Lordship then at 110–112 went to the heart of the matter and came to the question of law:

In fairness, however, to these directors, I will say that, although I have no doubt that they made these payments with a view to prefer Mr. *M'Keand* and Colonel *Underwood,* yet that preference was not the ultimate object they had in view. The preference was only a means to an end, the end being to relieve them from the necessity of providing cash out of pocket in order to pay up their shares. **The exchange of cheques was only a mode of setting off the amount due to them for fees against the amount due on their shares. The transaction, and the payment to them, would have been lawful and valid if the company had not been ordered to be wound up on a petition presented within three months after the payment; but the payment to them is made unlawful and void by the winding-up proceedings within that time.** Whether the directors expected a petition so soon I do not know, nor need I inquire: *Ex parte Griffith; Ex parte Hill*. As regards Colonel *Underwood* it was also contended that, owing to some defect in his appointment or qualification, he was not entitled to any fees. But it is unnecessary to examine this point, and I therefore pass it over.

**But now comes the question of law. If the company were an ordinary bankrupt trader to whom the mutual credit clause (sect. 38) of the *Bankruptcy Act,* 1883, was applicable, the preferential payments to Mr. *M'Keand* and Colonel *Underwood* could not be avoided by the trustee in bankruptcy, because they would have injured no one. The two debts could have been set one against the other after the bankruptcy just as effectually as before, and whether the debts were both paid or were set off against each other before the bankruptcy or after would be perfectly immaterial.** This being unquestionably true of ordinary traders, it is contended that sect. 164 of the *Companies Act,* 1862, is so worded as to involve the same consequence on the winding-up of a company, which must for this purpose be treated as a bankrupt trader. This argument is certainly ingenious, but to give effect to it would be to defeat those sections of the *Companies Act,* 1862, which prevent all set-off against calls on the winding-up of a limited company so long as any of its creditors are unpaid. See sect. 38, sub-sect. 7, and sect. 101; *Grissell's Case*. Sect. 164 is a general section applicable to all the creditors of all companies governed by the Act, whether they are limited or not, and whether the creditors are members or not; its language is, therefore, wide enough to include all creditors of all companies governed by the Act. But, in applying the section to limited companies and to the members of such companies, the special legislation applicable to them must be regarded and must not be defeated. The first part of sect. 164 must be construed as referring to the class of acts described in sect. 48 of the present *Bankruptcy Act,* 1883; and the words “any trader” in sect. 164 must be held to include traders to whom the mutual credit clause in the *Bankruptcy Act,* 1883, s. 38, is inapplicable, as well as to include those traders to which the clause is applicable. This construction does no violence to the language used, and is obviously required by those sections of the Act which expressly prevent a member of a limited company in arrear for calls from obtaining payment in full of debts due to him in preference to other creditors. The disallowance of a set-off against calls between a limited company and its members on a winding-up is to prevent any such preference, and its prohibition removes the only reason why a preferential payment in bankruptcy, where a set-off is allowable, is not fraudulent and void. The maxim *Cessante ratione cessat lex* is properly applicable in such a case. This construction of sect. 164 is not new; it was seen to be right and was distinctly adopted by Lord Justice *Cotton* in *Kent's Case*, and it is the only construction which does not defeat the obvious intention of the Legislature. It must be borne in mind that it has been already decided that sect. 10 of the *Judicature Act*,1875, has not repealed or affected the enactments in the *Companies Act,* 1862, prohibiting set-off against calls in the winding-up of limited companies: see *Gill's Case*. In considering this case I have assumed that the sums paid by Mr. *M'Keand* and Colonel *Underwood* were really due and payable by them to the company, although no calls had been made as contemplated by the articles of association. I am by no means sure that this is not taking too favourable a view of the position of these gentlemen. If the moneys were not due the case is much stronger against them: see *Sykes's Case*.

[emphasis added and footnotes omitted]

64 The creditor points to the view of Lindley LJ that the payments would have been set off against each other had the director’s liability not been for a call on his shares. Thus, it was submitted, the case supports the proposition here that a liability to repay a preference can be set off against another debt owed to the creditor. That is, however, to distort the facts of the analysis by Lindley LJ and to fail to appreciate the operation of the fraudulent preference provision under the 1883 Act. If the debt of the director to the company in *Re Washington Diamond* had not been for a call, there would have been mutual debit and credit existing prior to the winding up. If the parties had agreed to set them off or each had paid his and its debt in full (as in fact was done by exchange of cheques) there would have been no injury to the assets of the company (as Lindley LJ said) and so no dislocation of priorities for other creditors. There was a fraudulent preference under the 1883 UK Act because there was the payment of a debt with the relevant intention (not because there had been shown to be the effect of a preference, ie. a dislocation of equal distribution). Whatever assets the debtor company had remained untouched (if an agreed set-off) or remained at the same level (if paid in full by the creditor and received in full by the debtor) leaving the creditor without a proof in the estate, and the trustee without a claim against the creditor.

65 Here, on the agreed facts of the special case and on the hypothesis that an unfair preference is made out, the available assets of the debtor were depleted by the payment of the preference; but the obligation to disgorge the payment which would restore the depletion of the insolvent estate is said to be able to be set off against another debtof the insolvent company to the same creditor. Unlike the circumstances in *Re Washington Diamond*, there has been, on this hypothesis, injury to the other creditors; there has been a depletion of the company’s assets to pay a preference and the restoration or making good of that depletion is sought to be prevented by a set-off against another claim by the same preferred creditor. *Re Washington Diamond* (leaving aside the question of the call) was the cancelling out (whether by agreement or by two equivalent payments) of the creditor’s one position and the debtor’s one position. It was the equivalent of the operation of s 38 of the 1883 UK Act (the equivalent of s 553C). As Lindley LJ expressed it, there was no injury to the estate compared to the position that would have obtained under s 38 had the parties done nothing (leaving aside the debt being for a call). Here, in the facts of the special case, had the parties done nothing, the assets of the company would not have been depleted by the asserted preference and the creditor would have the right to prove *pari passu* for its various debts. The order of distribution has been dislocated by the payment which was, on this hypothesis, a preference. If the obligation to disgorge and replenish is to be allowed to be set off against the second debt, this dislocation remains, at least in part, as the preferred creditor (not the liquidator and the creditors) receives the return of the preference in full. The creditor effectively receives a return based not on the overall assets of the insolvent company and the overall claims of ranking creditors, but (at least) on the basis of the percentage of the preferred debt to the sum of the preferred debt and other debts which the preferred creditor is owed. The creditor remains able to prove for the balance (if any of the second debt). It is unclear whether it could or can also prove also for the debt that was preferred as part of the “balance of the account” for the purposes of s 86 of the 1966 Act or s 553C(1)(c) of the Act bearing in mind *Re Kratzmann* *(No 2)* or the terms of s 588FI of the Act (to which I will come). On the other hand, other general creditors of equal rank receive a *pari passu* distribution from the balance of the assets unreplenished by disgorgement of the preference, though also partially unburdened by the reduction or elimination of the proof of the creditor for the second debt that has been set off. The distribution of the general creditors is calculated by reference to the available unreplenished estate and the total value of creditors’ proofs. Priority creditors lose their priority in relation to the funds allowed to be set off. The liquidator has no right to the funds allowed to be set off for the costs of the administration.

66 The above understanding of *Re Washington Diamond* (and its difference from the position in the special case before us) is illuminated by the discussion by Robson J in *Jetaway Logistics Pty Ltd (rec & mgrs app’d) (in liq) v Deputy Commissioner of Taxation* [2008] VSC 397; 68 ACSR 226 of the decision of the Full Court of the Supreme Court of Victoria in *Re A & J Lazarotto Pty Ltd* (unreported, 1977 BC 7700145). (This discussion is unaffected by the reversal of the decision of Robson J by the Court of Appeal: [2009] VSCA 319; [2009] 26 VR 657.) Justice Robson and the Full Court in *Re Lazarotto* (the former under the Act and the latter under the *Companies Act 1961* (Vic) were dealing with the relationship between the set-off provision and the preference. In *Re Lazarotto* the Full Court applied the set-off provision of the 1966 Act to determine the ultimate effect of a transaction said to be a preference. That is, the Court applied the set-off provision in considering whether the transaction could be seen to have the effect of a preference. The facts and issues were described by Robson J at 68 ACSR 229 [11] as follows:

There the company owed its directors $7400 for rent of premises and the directors owed the company $8620 on a loan account. About a month before the company went into a creditors’ voluntary winding up, there was an exchange of cheques for $7400, satisfying the rent and reducing the loan account. The liquidator sought to set aside as a preference the payment for rent made by the company. The court observed that if the payment had not been made, in the liquidation, the directors could have set off against the loan they owed the company the rent owed to them. The court posed the question whether, by reason of the set-off provisions, the general body of creditors were worse off in the liquidation than they would have been if the transactions had not taken place. The court concluded the transaction had no effect on the payment of the general creditors in the liquidation.

67 This was the same position as in *Re Washington Diamond*. It is made clearer in expression, (with respect to Lindley LJ) by the absence of the mental element in the Australian provision. There was simply “no injury” to use Lindley LJ’s words, meaning that there was no prejudice or dislocation as the Full Court said in *Re Lazzarotto*: the payment did not have the effect of a preference given the operation of s 86, and so there was no preference.

68 The effect of giving a creditor a preference, priority or advantage is to be understood by reference to *Richardson v Commercial Banking Co of Sydney Ltd* [1952] HCA 8; 85 CLR 110 at 129. That effect is to be assessed as at the day of payment: *Airservices Australia v Ferrier* [1996] HCA 54; 185 CLR 483 at 501, applying *Calzaturificio Zenith Pty Ltd (in Liq) v NSW Leather & Trading Co Pty Ltd* [1970] VR 605 at 610; and *Re Discovery Books Pty Ltd* (1973) 20 FLR 470 at 475. As Fox J put it in *Re Discovery Books* at 475, approved by Dawson, Gaudron and McHugh JJ in *Airservices* at 501 (footnote 51):

… [T]he effect of a payment is to be judged after bankruptcy, with due regard for events occurring after the payment was made, and that one must ultimately come back to considering whether by reason of the payment, or dealing, there is less money available for the general body of creditors than otherwise might have been expected to be the case. …

See also the discussion by Finkelstein J in *Wily v St George Partnership Banking Ltd* [1999] FCA 33; 84 FCR 423 at 434–436.

69 Thus, *Re Washington Diamond* does not support the proposition sought to be drawn from it by the creditor.

70 *Lister v Hooson* [1908] 1 KB 174 concerned a voluntary settlement of £250 by a bankrupt on his wife declared void as against his trustee in bankruptcy. At the date of his bankruptcy, the husband owed the wife £700 in a marriage settlement of which £450 was secured. The wife claimed to set off her liability to repay the void voluntary settlement against the unsecured portion of £250 owed to her by her bankrupt husband. The right of set-off was (by majority in the Court of Appeal) rejected.

71 Lord Justice Vaughan Williams at 176 noted that once paid by the husband, the £250 could not be recovered from the wife by him, but it could be recovered by the trustee. At the date of the bankruptcy his Lordship said:

…[I]n order that debts may be set off they must be due respectively in the same right … [A] debt due to or from the trustee in bankruptcy and arising after the bankruptcy in the management of the estate cannot be set off against a debt from or to the bankrupt before the bankruptcy. Now the £250 which the husband paid to his wife in pursuance of the settlement which he had made on her never could have been recovered from her by the husband, but it can be recovered by the trustee in his bankruptcy. It is plain that at the date of bankruptcy there was no debt due from the wife to the husband and there is therefore no debt which the wife can utilise to pay herself the mortgage debt due to her from her husband, but she must come in and prove and get a dividend like the other creditors who have no available set-off.

72 Thus, for Vaughan Williams LJ there was no mutuality of debts between the same parties at the date of the bankruptcy, because *at and before* the relevant date there was no debt of any kind owed by the wife to the husband to set off against the debt he owed her. The settlement was void as against the trustee, but as between the parties the settlement was complete and not vitiated, even contingently.

73 Lord Justice Buckley was of the same view. First, his Lordship said that as between husband and wife the voluntary settlement was binding. There was therefore no £250 due from the wife to set off against the settlement owed to her by the husband. There was nothing to set off as between husband and wife. As to s 38 and its possible operation between the trustee and the wife, Buckley LJ said at 182–183:

… That section speaks of mutual dealings between the debtor and another person, and an account to be taken of what is due from the one party to the other in respect of such mutual dealings. The mutual dealing was between the husband and the wife. The account, therefore, is to be stated as between the husband and the wife. In an account as between those two parties there was no 250*l.* due from the wife to the husband, for as between those parties the settlement was valid. The strongest way of putting the argument in the wife's favour is to assert that the mutual dealing was one which included a stipulation as between husband and wife that, if the husband was bankrupt, the wife would repay. Those parties, however, could not contract that in that event repayment should be made by set-off as between the trustee and the wife.

In my opinion s. 38 does not apply. If the judgment below were right, beneficiaries under a voluntary settlement, which would be void as against a trustee in bankruptcy, could advance the moneys included in the voluntary settlement to the settlor without any fear of consequences in the event of his subsequent bankruptcy. If they did not so advance, they would have to repay if the debtor became bankrupt. If they did so advance, they would be exactly in the same position, for they would be entitled against their liability to make repayment of the settlement moneys to set off the amount due to them in respect of their advances. The contention involves that a particular creditor can so deal with the debtor as to entitle himself in the event of the debtor's bankruptcy to obtain pro tanto payment in full. In my opinion he cannot.

74 Lord Justice Fletcher Moulton dissented. His dissenting judgment was strongly relied upon by the creditor. Lord Justice Fletcher Moulton said that if the settlement had been a loan to the wife she could have set it off. His Lordship saw the interposition of the trustee as irrelevant, saying at 178–179:

The right of set-off in bankruptcy has been dealt with by various statutes, but takes its origin from the fact that the jurisdiction in bankruptcy was from the first an equitable jurisdiction. The successive statutory formulations of the consequence of this principle, embodied in the clauses as to mutual credit, dealings, &c., have never altered this fundamental principle, and, speaking for myself, I cannot see any ground why in the present instance the injustice should be perpetrated of making a person who in the balance is not a debtor to the estate pay in full the sum due to the estate and receive only a dividend on the sums due from the estate. Nor can I find any countenance for such a proceeding in decided cases. Lindley L.J. laid down in the Court of Appeal that the right of set-off existed in the much stronger case of payments void as fraudulent preferences: In re *Washington Diamond Mining Co*.; and damages due to fraudulent representation in the sale of an article, although they are of the nature of unliquidated damages and can only become a debt by action brought by the trustee, were, in the case of *Jack v. Kipping*, held to be the subject of set-off, and I can see no reason whatever why the circumstances of the present case should prevent it being applied in the present case. It was strongly urged before us that moneys belonging to the estate by reason of the provisions as to voluntary settlements are not the subject of set-off because the Act says that a voluntary settlement is to be void “against the trustee in the bankruptcy,” and that the interposition of the trustee makes some difference. In my opinion the trustee is merely a representative of the estate, and these provisions mean neither more nor less than that the money shall be considered to be due to the estate for the purposes of the bankruptcy, i.e., for paying the creditors of the estate. There is no object or meaning in drawing a distinction, so far as concerns the right of the estate to moneys to be used for this purpose, between those rights which require in the first instance some initiatory action on the part of the trustee and those that do not. There cannot be a more absolute right of the estate to property than that it should be a debt unquestionably due to the estate requiring no action whatever on the part of the trustee to make it recoverable. If set-off is allowed in such a case, it would in my opinion be contrary to reason to suggest that anything which falls short of this should be treated in a harsher manner.

[footnotes omitted]

75 But the reliance by Fletcher Moulton LJ on *Re Washington Diamond* overlooks the fact that the essence of Lindley LJ’s views was that there had been no injury to the estate by the round robin of cheques. Here the settlement denuded the estate of £250 and to allow a set-off was to allow, effectively, a distribution from the assets otherwise available to the creditors to the wife in full for the balance of the £700. This was the point made by Buckley LJ. It is the point here.

76 The real point in debate was (and it is put by the creditor here) why there should be any difference in point of analysis of mutuality if the voluntary settlement had been a loan, the liability in respect of which to repay could have been set off (as a mutual dealing between debtor and creditor) against the estate’s debt to her. The answer must lie in the meaning and operation of the statute: mutuality between the same parties in the same interest, and the recognition that the trustee’s right of recovery is in a different interest: the creditors of the estate under the relevant statutory regime through the estate. Further, the answer lies in the legal substance of the matter: it was not a loan. It was the payment to the wife from funds taken by the operation of the statute to be from the assets of the bankrupt estate. That was not a matter of form, but of legal substance.

77 That question of mutuality can be seen (as it was by Vaughan Williams and Buckley LJJ) not as a mere question of parties or some dry legal formality. At and before the relevant date, the wife did not owe the husband £250, the transaction as between them was complete. There was no contingency or equity in the husband to recover, nor in the wife to repay, the money. The husband had no equity which in the course of things, might mature from a contingency to a legal or equitable claim against the wife. There may have been a vulnerability to attack by a future trustee in bankruptcy; but that fact was the product of the fixing of the statute upon the circumstances to treat the transaction as void against the trustee, meaning that as against the trustee the payment was to be taken as having been made not from the debtor’s (husband’s) own money, but from the estate administered by the trustee, the debt of the debtor to the preferred creditor remaining unpaid, or in the case of a company in liquidation the payment is to be taken as from the assets to be distributed amongst all creditors, not from the debtor company’s assets. Once one appreciates the statutory character of the notion of the payment being void against the trustee, the views of Vaughan Williams and Buckley LJJ can be seen to be founded on the legal and equitable substance of the transaction, the circumstances and the operation of the statute, and not on the dry legal form of the transaction. No set-off should be allowed because there was no mutuality at the relevant date; the moneys to be disgorged are for the payment of creditors in accordance with the statute, and so for the *pari passu* benefit of all creditors of equal rank, after priority creditors are paid and the costs of the administration provided for; the moneys are not to be treated as if they were those of the company due to it in satisfaction of some right or equity of it as a creditor of the (re-) payer, capable of being considered to be referable to some mutuality of dealing and available for set-off for the benefit of one creditor, the (re-) payer creditor, not all creditors. The call by Fletcher Moulton LJ to an equivalence of effect in other circumstances was based on viewing the “trustee’s interposition” as of no substantive importance. That, with respect, was to overlook the legal and equitable substance of the effect of the transaction and the *operation of the statute in the circumstances*, which was to treat the £250 ashaving been paid from the bankrupt estate: that is, the substantial legal effect of the transaction being void against the trustee.

78 Not long thereafter in *In re a Debtor; Ex parte Peak Hill Goldfield Limited* [1909] 1 KB 430 Fletcher Moulton LJ (doubtfully consistently with his views in *Lister v Hooson*, though consistently with the views of Vaughan Williams and Buckley LJJ in that case) expressed himself in terms of general principle that has been influential. The case was of some complexity, not involving a preference. At 437 his Lordship said:

… Moneys which under a bankruptcy became payable to the trustee … because they were payable to the debtor, come prima facie within the mutual credits clause, but not if they are moneys which, upon bankruptcy, become payable to the trustee in his right as trustee and not by virtue of their being payable to the debtor.

Lord Justice Farwell expressed himself in similar terms at 438.

79 In the 10th edition of Baldwin ET, *A Treatise upon the Law of Bankruptcy and Bills of Sale* (10th ed, Stevens and Haynes, 1910) at 620–621 it was stated, echoing this way of putting it, and citing *Lister v Hooson* and *In re a Debtor; Ex parte Peak* *Hill Goldfield* that:

Moneys which under a bankruptcy become payable to the trustee because they were payable to the bankrupt for prima facie within the mutual credits clause; *aliter*, if upon bankruptcy, they become payable to the trustee in his right qua trustee, *ex gr*, if in respect of a transaction by or with the bankrupt which he has set aside in the proceeding, or if the claim has arising in the course of his management of the bankrupt’s estate.

80 In the 7th and 11th editions of Vaughan Williams RL and Hansell EW, *The Law and Practice in Bankruptcy* (7th ed, Stevens and Sons, 1898) and Vaughan Williams RL, Hansell EW and Hansell ME, *The Law and Practice in Bankruptcy* (11th ed, Stevens and Sons, 1915) at 139 and 165 it was stated on the authority of *Re Washington Diamond* at 111:

Payments void as fraudulent preferences may, it seems, be set off against debts due from the preferred creditor to the bankrupt.

81 Care needs to be taken in using that proposition. It is not supportive of the creditor’s argument in the special case. The set-off is of the payment by the debtor found to be a fraudulent preference (that is a payment with the relevant intention) against the debt due *from* the preferred creditor. The authors were referring to the state of the mutual debits and credits, not the obligation to disgorge the preference being set off against a debt due from the debtor to the preferred creditor.

82 *Lister v Hooson* was followed by Street J in *Re Hermann; Ex parte Official Assignee* (1916) 16 SR (NSW) 264 at 269.

83 In 1926, Astbury and Clauson JJ in the Chancery Division decided *In re A Debtor* [1927] 1 Ch 410. Both the liquidator and the creditor relied upon this case. The appellant, the managing director of an insolvent company, obtained a judgment against the company for a sum lent to it by him. A provisional liquidator who had been appointed to the company paid, under pressure, the judgment debt in full. The company was later wound up. The liquidator (not the provisional liquidator) obtained an order that the director repay the sum as a fraudulent preference. The appellant failed to repay the money and a bankruptcy notice was issued and, at the hearing of the petition, a receiving order was made against him, the Registrar refusing to allow a set-off against the amount that he was ordered to pay. The creditor emphasised that this was a case about the inability to set off the very debt that was the subject of the preference; and that it was thus no authority concerning the right to set-off against another debt, which, it was submitted, had been dealt with in *Re Washington Diamond*.

84 The facts of the case require close attention. The bankruptcy notice issued by the liquidator was for £404 1s, being the total amount of the preference that the appellant director had been ordered to pay. The appellant had lodged a proof in the winding up for £769 for unpaid salary, which proof the liquidator had rejected. The application to set aside the bankruptcy notice was adjourned to allow an appeal from the rejection of the proof. That appeal was heard by the Vice-Chancellor of the County Palatine Court of Lancaster and the appellant succeeded in part and was given leave to prove for £224. The liquidator was also ordered to pay the costs of the appeal which were taxed at £203 11s 6d. The Registrar refused to set the bankruptcy notices aside. Later, on the hearing of the petition, a receiving order in bankruptcy was made. The sums now owed to the company by the appellant totalled £744 11s 6d, being the order to repay the preference of £404 1s and the taxed costs of the liquidator’s motion of £340 10s 6d. The Registrar refused to allow a set-off of the sum of £831 12s 6d, which comprised the underlying debt of £404 1s the subject of the void preference, the sum of £224 of unpaid salary allowed by the appeal to the Palatine Court, plus the costs of that action of £203 11s 6d. Counsel for the appellant relied on Lindley LJ in *Re Washington Diamond* and Fletcher Moulton LJ in *Lister v Hooson*. As is clear from the introductory paragraph of the reported judgment [1927] 1 Ch at 415 both sides to the litigation were stating all sums on both sides of the account: £831 12 s 6 d said to be owed by the company to the appellant and £744 11 s 6 d said to be owed by the appellant to the company.

85 The question decided was, however, limited to the £404 1s, as Astbury J put the issue in the second paragraph, saying: “The first matter that has to be argued is whether or not the appellant has a good set-off against the mutual credit clause or otherwise in respect of the sum of £404 1 s mentioned in the bankruptcy notice.” If this sum could not be set off the receiving order was likely made. Justice Astbury said that to allow this set-off would reduce the fraudulent preference provision to a nullity. In saying that, his Lordship was plainly dealing with what the creditor concedes here: that one cannot set off against the obligation to repay the preference the very debt the subject of the preference. He continued, however, at 416–417:

**Here there was no mutual dealing between the appellant and the company at all, until after the winding up. On the winding up taking place, an order was obtained by the liquidator against the appellant for the sum which is said to be and to consist of a mutual credit.** **In my opinion it is nothing of the kind. *In re Washington Diamond Mining Co*. is relied upon by Mr. Hansell on behalf of the appellant, and he contended that, if in that case the debt against which the set-off was claimed had been a debt of an ordinary trader and not one in respect of calls due to a company, the decision would have been different and a set-off would have been allowed. In that case, however, there were two totally separate debts or credits or debits. One was the liability of a director to pay the calls on his unpaid shares, the other was the liability of the company to him in respect of his director's fees; and, I think, that it may be the case that, had it not been for the fact that the debt attempted to be set off was one in respect of unpaid calls, there would have been, as Lindley L.J. points out, a right of set-off both before and after the bankruptcy in respect of those two separate and independent debts**. Mr. Hansell next relies on a passage in the judgment of Fletcher Moulton L.J. in the case of *Lister v. Hooson*, where that learned Lord Justice said: “The right of set-off in bankruptcy has been dealt with by various statutes, but takes its origin from the fact that the jurisdiction in bankruptcy was from the first an equitable jurisdiction. The successive statutory formulations of the consequence of this principle, embodied in the clauses as to mutual credit, dealings, etc., have never altered this fundamental principle, and, speaking for myself, I cannot see any ground why in the present instance the injustice should be perpetrated of making a person who in the balance is not a debtor to the estate pay in full the sum due to the estate and receive only a dividend on the sums due from the estate.” **In that case there was a difference of opinion in the Court on the question of fact as to whether there was a debt due from the wife to her husband, the bankrupt, against which the wife claimed the right to set off a debt due to her from him; and the majority of the Court held that there was no such debt which could be set off against the debt due from the husband to her**. But Fletcher Moulton L.J. continues: “Lindley L.J. laid down in the Court of Appeal that the right of set-off existed in the much stronger case of payments void as fraudulent preferences: *In re Washington Diamond Mining Co*.; and damages due to fraudulent representation in the sale of an article, although they are of the nature of unliquidated damages and can only become a debt by action brought by the trustee, were, in the case of *Jack v. Kipping*, held to be the subject of set-off, and I can see no reason whatever why the circumstances of the present case should prevent it being applied in the present case.” That proposition is not, as far as I can understand it, assented to by Buckley L.J. in his judgment in the same case; but it becomes unnecessary to discuss the exact result of that dissenting judgment, having regard to a considerable number of decisions in which the exact point we have to decide has been determined. …

86 Justice Astbury then referred to *Re Anglo French Cooperative Society; Ex Parte Pelly* [1882] 21 Ch D 492, *Flitcroft’s Case* [1882] 21 Ch D 519 and *In Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch D 809 in aid of the proposition that at the relevant date there were no mutual debts. In *Ex parte Pelly* (and in the decision the following day in *Flitcroft’s Case*) the liability for misfeasance of directors was held to derive from orders at the instance of the liquidator not upon a claim by the company. This reasoning of Astbury J as to a lack of mutuality would deny the set-off under the statute, not only to the underlying debt the subject of the preference payment, but also to any debt owed by the bankrupt. This is how the authors of Hunter M, Graham D and Crystal M, *The Law and Practice of Bankruptcy* (19th ed, Stevens and Sons, 1979) at 200 and 355 viewed it. Justice Astbury can be seen to analyse *Re Washington Diamond* in the manner that I have identified, and rejected the approach of Fletcher Moulton LJ in *Lister v Hooson*.

87 Justice Clauson’s reasons were blunt and directed only at the underlying debt the subject of a preference. To order a set-off would be absurd, he said.

88 There can be no doubt that there cannot be a set-off of the order to disgorge the preference against the very debt the subject of the preference. The creditor here accepts that. It is made plain by *In re A Debtor* [1909] 1 KB 430 as it is made plain in Australian bankruptcy law at the time by Paine J in *Re Grezzana* (1932) 4 ABC 203 at 205–206; by Lukin J in *Re Smith* (1933) 6 ABC 49 at 57; and by Clyne J in *Re Amour* (1956) 18 ABC 69.

89 In *Re Grezzana*, Paine J dealt with it as a matter of statutory construction of ss 82 and 95 of the 1924 Act saying at 206:

… I think it is clear that s 95 must prevail over s 82. Any other conclusion would, it seems to me, result in s 95 being evaded in wholesale fashion.

90 It is to be noted that in *Re Clements* (1931) 7 ABC 255 at 267–268 Paine J made clear his view that s 95 overrode s 82 in respect of the very transaction, but he said at 269: “I am not prepared to go further”. Thus, the passage in *Re Grezzana* should be viewed as directed only to the debt of underlying preference.

91 In *Re Amour*, Clyne J dealt with the question of set-off in some detail and as a matter of principle. The case concerned the reduction of indebtedness of an erstwhile debtor to his bank by a number of payments totalling £800 6s 1d. The bank had lodged a proof of £295 11s for the balance of indebtedness. The bank sought to set off by way of defence under s 82 of the 1924 Act each of the underlying debts for which the preferential payments were made. Justice Clyne rejected this argument, referring to the Earl of Selborne LC in *In Re Milan Tramways Company* (1884) 25 Ch D 587 at 591 and Dixon J in *Hiley* at 497 in respect of the requirement of mutuality. Justice Clyne concluded that there was no mutuality because the moneys must be due in the same right, saying at 76:

… The reason for this is that the amount is payable to the trustee not because it was a debt due to the bankrupt, but because it is payable to the trustee *qua* trustee on the setting aside of some transaction.

His Honour then referred separately to the reasons of Clauson J in *In Re A Debtor*.

92 The reasoning of Clyne J (like that of Vaughan Williams and Buckley LJJ in *Lister v Hooson* and Astbury J in *In re A Debtor*) as to the lack of mutuality meant that s 82 was not available to set off *any* debt of the debtor (now bankrupt) to the creditor against the creditor’s obligation to disgorge the preference, and not just the debt in respect of which the preference was given.

93 In *Calzaturificio* [1970] VR 605 at 618, Menhennitt J stated the broad proposition that “a payment which is void as a preference cannot be set off under s 82 of the Bankruptcy Act”. He cited *Re Clements*, *Re Smith*, and *Re Grezzana*, as referred to in the then 3rd edition of McDonald, Henry & Meek: McDonald EF, Henry HA, Meek HG, Manning JK and Bohringer LG, *Australian Bankruptcy Law and Practice* (3rd ed, Law Book Co, 1953). It can be accepted, as submitted by the creditor, that Menhennitt J’s statement was in the context of dealing with the asserted set-off between the obligation to repay and the underlying debt paid out by the preference.

94 In the first edition of McDonald EF, *The Australian Bankruptcy Law and Practice* (Law Book Co, 1928) the following was stated in the annotation to s 82 at 158–159:

Moneys, which under a bankruptcy become payable to the trustee because they were payable to the debtor, come *prima facie* within the mutual credits section, but not if they are moneys which upon bankruptcy become payable to the trustee in his right as trustee and not by virtue of their being payable to the debtor*. Re a Debtor; Ex parte Peak Hill Goldfield Ltd* [1909] 1 KB 430.

95 This statement was wide enough to encompass denial of the right of set-off to any debt owed to the creditor and not just the subject debt. The same passage appears in the second, third and fourth editions of 1940, 1953, and 1968 (and the fifth edition, the first loose leaf edition) citing not only *Re a* *Debtor; Ex parte Peak Hill Goldfield Ltd* [1909] 1 KB 430 but also *Lister v Hooson*. The fourth edition, whose editors included Mr William Deane QC, also restated the passage relied upon by Menhennitt J in *Calzaturuficio*: McDonald EF, Deane WP, *Australian Bankruptcy Law and Practice* (4th ed, Law Book Co, 1968)*.*

96 In the tenth edition of Lewis AN and Rose DJ, *Australian Bankruptcy Law* (10th ed, Law Book Co, 1994)*,* the author, Mr Dennis Rose QC said the following of voidable preferences and set-off at 107:

An obligation to repay money to a trustee on the ground that it is a voidable preference (see s 122) is not “mutual” with debts owed by the bankrupt to the creditor: for this purpose the trustee is not identified with the bankrupt so the liabilities are not owed to and by the one person: *Re Amour* (1956) 18 ABC 69 at 75-76.

It has been argued in several cases that the trustee cannot, under s 122, recover the full amount of the preferential payment since s 86(1)(c) restricts the claim in all in such cases to “only the balance” after taking the accounts of all the mutual dealings, including the preferential payment. However, this argument has not succeeded. Any payment that is a voidable preference under s 122 is recoverable by the trustee in full and the creditor can only lodge a proof of debt and rank with the other creditors; in other words, s 122 overrides s 86: *Re Clements* (1931) 7 ABC 255 at 268-269; *Re Grezzana* (1932) 4 ABC 203; and *Re Smith* (1933) 6 ABC 49 at 57.

…

It seems that mutual transactions outside such sections as ss 120, 121 and 122, and before notice of any act of bankruptcy, can all be included in a set-off: *Re Clements* (1931) 7 ABC 255.

97 In the eighth edition of Lewis AN and Rose DJ, *Australian Bankruptcy Law* (8th ed, Law Book Co, 1984) Mr Rose had stated to the same effect at 105–106:

Some further arguments have been used against the trustee where there have been mutual dealings in the course of which the creditor has received from the bankrupt a payment that is a voidable preference within s 122. It has been argued in several cases that the trustee cannot, under s 122, recover the full amount of the preferential payment since s 86(1)(c) restricts his claim in all such cases to “only the balance” after taking accounts of all the mutual dealings including the preferential payment. However this argument has not succeeded. Any payment that is a voidable preference under s 122 is recoverable by the trustee *in full* and the creditor can only lodge a proof of debt and rank with the other creditors; in other words, s 122 overrides s 86: *Re Clements* 7 ABC 255 at 268-269; *Re Grezzana* 4 ABC 203; *Re Smith* 6 ABC 49 at 57.

….

It seems that mutual transactions outside such sections as ss 120, 121 and 122, and before notice of any act of bankruptcy, can all be included in a set-off: *Re Clements* 7 ABC 255.

98 See also McPherson BH, *The Law of Company Liquidation* (1st ed, Law Book Co, 1968) at 351.

### Conclusion as to the legal context at the time of the Harmer Report

99 From the above, the following can be taken to be the tolerably clearly accepted position in Australia as to the right of set-off and the position of a preferred creditor ordered to repay or disgorge a preference at the time of the Harmer Report. First, there could be no set-off of the underlying debt against the obligation to disgorge the preference. Secondly, the right to the recovery of the preference was of the trustee or liquidator and not the bankrupt or company, not by reference to any right of the debtor, but in the trustee’s or liquidator’s own right for the benefit of all creditors and the administration of the estate under the terms of the relevant statutory regime, thereby denying the mutuality essential to the operation of s 82 or s 86. Thirdly, the underlying reasoning of the majority in *Lister v Hooson*, the expression of general principle by Fletcher Moulton LJ in *Re a Debtor; Ex parte Peak Hill Goldfield Limited*, the reasoning of Astbury J in *Re a Debtor*, and of Clyne J in *Re Amour*, reflected in the proper analysis of the preference and the legal substance of the phrase “void against the trustee or liquidator” seen in *Burns v Stapleton*, *Jaques*, *Brady v Stapleton*, *Williams v Lloyd*, and *Kratzmann (No 1)* and *(No 2)* reinforced and underpinned the above second proposition as to the lack of mutuality, as a matter of legal substance, between the creditor and the trustee or liquidator, notwithstanding the breadth of the concept of mutuality discussed in *Hiley*, *Day & Dent Constructions* and *Gye v McIntyre*. Nothing in *Re* *Washington Diamond*, properly understood, is to the contrary of the above. The above propositions were reflected in the major insolvency texts in Australia and England before 1992.

## Enactment history: the Harmer Report

100 The Harmer Report recommended the enactment of specific provisions dealing with the avoidance of antecedent transactions: see the Harmer Report Ch 14 [628]–[711]. Mutual credit and set-off was dealt with in Ch 16 dealing with “claims in insolvency”. As to set-off, see [815]–[819].

101 The Commission’s approach was to maintain the policy of the existing law: see [630]–[631]. It did, however, follow its suggestion in the Discussion Paper No. 32 of 1987 (**DP 32**) (which had wide support) to restructure the wording of the draft legislation into provisions independent of adopting the 1966 Act: see DP 32 [419] and the Harmer Report [633]. As to preferences, the Commission proposed redrafting. The aim of the redrafting was to express the nature of a preference in clear and simple terms using four elements to the transaction: that it was made when the debtor was insolvent; that it was to or for the benefit of a person on account of a past debt or liability; that it occurred within the prescribed time period; and that the transaction is one which enables the person to receive more toward satisfaction of the debt or liability than would otherwise be the case in the winding up: see the Harmer Report [638].

102 As to mutual credit and set-off the Commission identified a current weakness as the linkage to bankruptcy and in particular the linkage to the irrelevant notion of “act of bankruptcy”. It was necessary therefore to identify, in different wording, circumstances in which a right of set-off was precluded. In DP 32 at [543] the Commission suggested something that could be seen as an equivalent of an act of bankruptcy: that a winding up application was pending. Submissions from the public were received. Some were in the support of that suggestion. Others suggested broadening the preclusion. At [818] the following appeared in respect of this latter suggestion:

[I]nstead of referring to notice that a winding up application against the company was pending, the proposal should refer to notice either that a winding up application against the company was pending or that facts existed which could ground an application for winding up of the company.

103 The Commission said the following in relation to that suggestion:

Their reasoning was that it would otherwise be too easy to create set-offs against an insolvent company as the basis of effectively obtaining a preference.

104 The Commission indicated that it accepted the thrust of this submission, saying:

The Commission has decided that the situations for excluding a right of set-off should correspond to the situations where a transaction may be avoided on the basis that it is preferential.

105 Thus, in the following paragraph ([819]) the Commission made the following recommendations:

Accordingly, the Commission recommends that there be no right of set-off where

* The transaction made was within the six months immediately preceding the commencement of the winding up (two years for a related person) and
* At the time of the transaction the person had reason to suspect that the company was unable to pay its debts.

106 The Parliament did not, however, adopt this suggestion. The creditor directs attention to this failure to adopt a preclusionary provision in s 553C(2) which would have aligned the preclusion to the loss of the defence under the preference provision. From this, it submitted that the solution to the present problem had been suggested by the Commission but not adopted by Parliament. That, with respect, overstates the matter. It can be accepted that Parliament did not adopt a course which may well have precluded a party in the position of the creditor here from obtaining set-off. However, there was no attempt in the Harmer Report, including its draft legislation, to modify, by way of broadening, the notion of genuine mutuality. It is to be recalled that the High Court in *Gye v McIntyre* indicated that there were *two* aspects of the prevention of abuse of the set-off provision: the preclusion (subs (2)) and the genuineness of mutuality. No change was suggested as to the elements or conception of the set-off which in the recommended legislation adopted the words and concepts in s 86 of the 1966 Act.

## The text, structure and purpose of the legislation and the proper construction of s 553C

107 It can be accepted that s 553C and preferences are in different parts of the Act and contain no explicit reference to each other. That said, as Dixon CJ, Fullagar, Kitto and Taylor JJ said in *Jacques*, the preference provision (there, s 95(1) of the 1924 Act) is in the nature of a corollary to the provisions dealing with the control over the administration of property and proofs of debt and priority of debts. The relationship is one related to the proper administration of the estate and in ascertaining whether the payment does have the effect of a preference. This is the point made by the Full Court in *Re Lazarotto* discussed by Robson J in *Jetaway Logistics,* by Buckley LJ in *Lister v Hooson*, by Astbury J in *In Re a Debtor*, and, properly understood, by Lindley LJ in *Re Washington Diamond*.

108 Thus, it is not correct to say, as the liquidator did in his first proposition (see [23] above) that Pt 5.7B (in which the unfair preference provision appears) and Pt 5.6 (in which s 553C appears) are in different spheres of operation.

109 The text of s 553C was drawn closely by reference to pre-existing provisions in bankruptcy legislation. That is made clear in the Harmer Report to which reference has already been made. Thus, it would be surprising if a significantly different position obtained under new drafting designed to be clear and simple and to maintain the policy of the existing law. The question is whether there have been, before the relevant date, mutual credits, mutual debts, or other mutual dealings between the company and the creditor, such that an account is to be taken of what is due from one to the other (the company and the creditor) such that they be set off. The analysis of such will take place by reference to the authorities on mutuality to which reference has been made. Though mutual credit and set-off can be expressed as an exception to the fairness of equity being equality as the underpinning value of *pari passu* distribution, it is perhaps better expressed as a cognate reflection of equity’s concern with substantive fairness, based, as it is, on substantial fairness of reciprocity before the imposition of equality of distribution. If there is genuine mutuality of debts or credits or genuine mutuality of dealing between the debtor and creditor, an insistence upon the creditor paying in full its debt and being required to prove (and only receive a *pari passu* distribution) for the debtor’s mutual obligation to pay its debt can be seen as unfair. To satisfy fairness is not to dislocate the equal division of the available estate, it is to ascertain the extent of the available estate and what can be proved in it. The words of the section and the cases that explain them (through earlier provisions) should thus be examined in this light and with the recognition of the purpose and context of the inquiry: the administration of the insolvent estate of the debtor in a way that vindicates the fairness of recognising substantive reciprocal mutuality of obligations and entitlements, and the fairness of equal and orderly access of creditors to the insolvent estate of the debtor, including the access of priority creditors.

110 Before further discussing s 553C and mutuality, it is necessary to discuss the provisions concerning unfair preferences: ss 588FA, 588FC, 588FE, 588FF and 588FI, and other relevant provisions. These provisions are found in Div 2 of Pt 5.7B concerning other voidable transactions: uncommercial transactions in s 588FB, unfair preferences and commercial transactions may be insolvent transactions in s 588FC, unfair loans to a company in s 588FD, unreasonable director-related transactions in s 588FDA. This is so because the proper construction and reach of s 553C is to be arrived at in the context and purpose of the provisions concerning unfair preferences and the Act as a whole.

111 The structure of the Division is, first, to define these transactions (ss 588FA–588FDA); secondly, to identify when they are voidable (s 588FE); and thirdly, to set out the suite of orders that can be made by the Court if it is satisfied that the transaction is voidable (s 588FF).

112 Section 588FA(1) is as follows:

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

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

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

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

113 The text and structure of the provision reflects the simplicity and clarity referred to in the Harmer Report. The nature of the preference is to be derived from its objective character, as under s 122 of the 1966 Act and s 95(1) of the 1924 Act. It is the difference between the effect of the transaction on the one hand, and setting it aside (and implicitly the company receiving the disgorged payment) and proving for the debt, on the other. The section describes the dislocation of the *pari passu* distribution of the estate.

114 Section 588FB(1) defines uncommercial transactions as follows:

A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company’s circumstances would not have entered into the transaction, having regard to:

(a) the benefits (if any) to the company of entering into the transaction; and

(b) the detriment to the company of entering into the transaction; and

(c) the respective benefits to other parties to the transaction of entering into it; and

(d) any other relevant matter.

115 Section 588FC defines insolvent transactions as follows:

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.

116 The reason for the collective definition of unfair preference and the uncommercial transaction can be seen in the use of the phrase “insolvent transactions” in s 588FE dealing with “voidable transactions”.

117 Section 588FE(1) provides that, if a company is being wound up a transaction may be voidable because of any one or more of subss (2) to (6) if the transaction was entered on or after 23 June 1993 and because of subs (6A) if it was entered after the commencement of legislation in 2003 dealing with directors’ bonuses, as follows:

(1) If a company is being wound up:

(a) a transaction of the company may be voidable because of any one or more of subsections (2) to (6) if the transaction was entered into on or after 23 June 1993; and

(b) a transaction of the company may be voidable because of subsection (6A) if the transaction was entered into on or after the commencement of the Corporations Amendment (Repayment of Directors’ Bonuses) Act 2003; and

(c) a transaction of the company may be voidable because of subsection (6B) if the transaction was entered into on or after the commencement of that subsection.

118 The word “voidable” reflects to a degree the pre-existing conception of void against the trustee in bankruptcy or against the liquidator meaning voidable. The conditions of the transaction being able to be characterised as voidable do not bring about an avoidance of the transaction as between the parties to it: the company and the creditor. Nor do they provide the foundation for the liquidator to elect to treat the transaction as avoided to entitle him or her to avail him or herself of an action for moneys had and received. Rather, as one sees from s 588FF, the presence of the conditions that permit such characterisation entitle the liquidator to commence an action under the statute for a range of relief, including payment of money to the company. The consequences of the transaction being voidable are consistent with the previous law that the nature of the voidableness was related to, and had relevance to, the insolvent administration, as opposed to having general legal consequences of avoidance of the transaction or its constituent instruments as between the parties to the transaction or for all purposes.

119 Section 588FE(2) provides for the voidableness of insolvent transactions (unfair preferences and uncommercial transactions) as follows:

(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.

120 The “relation-back day” referred to in s 588FE(2)(b)(i) is defined by ss 9 and 91 and referentially s 513C and Div 1A of Pt 5.6 variously depending upon the circumstances. In a winding up by the Court where there is no administration involved as provided in items 1–13 of s 91 and where because of Div 1A of Pt 5.6 the winding up is taken to have begun on the day when the winding up order was made, the relation-back day is the day when the application for the winding up order was filed. So, in such a case an unfair preference entered into at the time when the company is insolvent within six months prior to the date of the filing of the application for the winding up order is voidable.

121 Subsections 588FE(2A) and (2B) concern transactions of a company under administration and subject to a deed of company arrangement, respectively.

122 Section 588FE(3) extends the period for the voidableness of insolvent transactions that are uncommercial transactions to two years before the relation-back day.

123 Section 588FE(4) extends the period of voidableness of insolvent transactions (and so unfair preferences) to which a related entity is a party to four years before the relation-back day.

124 Section 588FE(5) extends the period for the voidableness of insolvent transactions (and so unfair preferences) to which the company became a party for the purpose of defeating creditors to ten years before the relationship-back day.

125 Section 588FE(6) concerns unfair loans.

126 Section 588FE(6A) concerns unreasonable director-related transactions.

127 Section 588FF(1) provides for the power of the Court on the application of the company’s liquidator to make one or more of various orders in paras (a) to (j) where a court is satisfied that a transaction of the company is voidable because of s 588FE. The reliance upon the general law of an action for money had and received in the right of the liquidator has been replaced by a wide and flexible suite of orders to permit the court to remedy the position justly. As before, the action is that of the liquidator. Paragraphs 588FF(1)(a) to (j) are as follows:

(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;

(b) an order directing a person to transfer to the company property that the company has transferred under the transaction;

(c) an order requiring a person to pay to the company an amount that, in the court’s opinion, fairly represents some or all of the benefits that the person has received because of the transaction;

(d) an order requiring a person to transfer to the company property that, in the court’s opinion, fairly represents the application of either or both of the following:

(i) money that the company has paid under the transaction;

(ii) proceeds of property that the company has transferred under the transaction;

(e) an order releasing or discharging, wholly or partly, a debt incurred, or a security or guarantee given, by the company under or in connection with the transaction;

(f) if the transaction is an unfair loan and such a debt, security or guarantee has been assigned—an order directing a person to indemnify the company in respect of some or all of its liability to the assignee;

(g) an order providing for the extent to which, and the terms on which, a debt that arose under, or was released or discharged to any extent by or under, the transaction may be proved in a winding up of the company;

(h) an order declaring an agreement constituting, forming part of, or relating to, the transaction, or specified provisions of such an agreement, to have been void at and after the time when the agreement was made, or at and after a specified later time;

(i) an order varying such an agreement as specified in the order and, if the Court thinks fit, declaring the agreement to have had effect, as so varied, at and after the time when the agreement was made, or at and after a specified later time;

(j) an order declaring such an agreement, or specified provisions of such an agreement, to be unenforceable.

128 Section 588FF(1)(g) gives the court a discretion in relation to the proving of the creditor in relation to the debt the subject of the transaction. In relation to unfair preferences this can be seen to ameliorate, by judicial discretion, the rigidity of the approach required by *Kratzmann* *(No 2)* (See [43] above.) As the creditor submitted, s 588FF(1)(g) is directed to the proving for the debt the subject of the preference.

129 By subs 588FF(2) nothing in subs (1) limits the generality of anything else in it.

130 The time for making an application under s 588FF(1) is set out in subs (3): it may only be made either (a) during the period beginning on the relation-back day and ending on the later of three years after that day or 12 months after the first appointment of a liquidator in relation to the winding up of the company or (b) within such longer period as the Court orders on application by the liquidator made within the time period provided for in para (a).

131 Section 588FG(1) provides for circumstances where the transaction is not voidable, as follows:

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

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

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

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

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

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

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

(emphasis added)

132 Section 588FI appears in Subdiv E of Div 2 and deals with “Various rules about voidable transactions”. It provides for a creditor proving as if the transaction had not been entered into. It provides as follows:

**Creditor who gives up benefit of unfair preference may prove for preferred debt**

(1) This section applies where:

(a) a transaction is an unfair preference given by a company to a creditor of the company after 23 June 1993; and

(b) at the request of the company’s liquidator, because of an order under section 588FF or 588FGAA, or for any other reason, the creditor has put the company in the same position as if the transaction had not been entered into.

(2) A court must not make under section 588FF, on an application relating to the transaction, an order prejudicing a right or interest of the creditor.

(2A) ASIC must not make an order under section 588FGAA that relates to the transaction and prejudices a right or interest of the creditor.

(3) The creditor may prove in the winding up as if the transaction had not been entered into.

133 The creditor submitted that the section is directed only to the debt in question. That submission is supported by the heading to the section. The heading is part of the Act: s 13(1) of the *Acts Interpretation Act 1901* (Cth). However, as the Full Court said in *Quickfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd* [2014] FCAFC 70; 222 FCR 13 at 31 [82]: “… the section heading is just that – a heading. The text of the provision is crucial.” The section is expressed in general terms, and is certainly not directed in its terms only to the debt the subject of the preference, though of course it covers such debt. The premise of the section is that an order under s 588FF(1) such as an order under para (a) to pay an amount equal to all of the money that the company has paid under the transaction will put the company in the same position as if the transaction had not been entered into. That is inconsistent with s 553C being engaged. The company cannot be put “in the same position as if the transaction had not been entered into” without replenishing the assets of the company and leaving the creditor with its two debts to be the subject of proof. If the unfair preference transaction had not been entered into there was no debt of the creditor to the company to set off against either debt of the company to the creditor. To allow a set-off under s 553C would see one creditor paid in full as to one debt (the second debt) to the extent of the preference repayment, and the assets of the estate unreplenished, though with a reduced burden of claim to prove by the creditor for the second debt. This is not “the same position as if the transaction had not been entered into.”

134 Further, if s 553C brings about a set-off in relation to the payment under s 588FF(1) and the second debt, what of the preferred debt? If the creditor can prove for it, notwithstanding s 588FI, the dislocation is further compounded. If it cannot prove there has still been dislocation, because the creditor by the set-off of the obligation to pay under s 588FF(1) and the second debt receives an effective return which is arbitrary based on the proportion of the preferred payment to the sum of the preferred debt and the second debt, such having no relationship to (being possibly more, possibly less, than) what would have been its return had the transaction not been entered into, and having no relationship to the returns of the other ranking creditors based on the remaining assets of the insolvent company.

135 Section 588FI sits incongruously and uncomfortably with any proposition that an obligation to repay an unfair preference is to be set off against a second debt of the company to the preferred creditor the subject of the order. Indeed, for the above reasons it can be seen as inconsistent with s 553C being engaged in the manner propounded by the creditor.

136 A number of other observations may be made about the above provisions, in particular as they apply to unfair preferences, as relevant to the later discussion of the authorities relevant to s 553C. *First*, the notion of voidableness aligns with the pre-existing conception of void against the liquidator. That is, there is no “avoidance” brought about by the insolvency. Rather, at the election of the liquidator, a proceeding can be brought by the liquidator under s 588FF and the character of the transaction being voidable is relevant only to the availability of relief in the proceeding: cf *Kratzmann (No 1)* 123 CLR at 277; and *Re Starkey* [1994] 1 Qd R 142 at 152. The consequence of the status of voidableness is not to undo or set aside the transaction or its constituent documents thereby putting the parties (debtor and creditor) into their antecedent legal position and thereby creating rights in the debtor company or obligations in the creditor, based on the avoidance. Rather, satisfaction of the Court of the character of the transaction as voidable is the condition for the remedial powers of the Court in s 588FF(1) to be exercised on the application (only) of the liquidator. It is the liquidator’s action, as it previously had been in the action for moneys had and received.

137 *Secondly*, the application can only be made by the liquidator during a period beginning with the relation-back day: s 588FF(1) and (3). The liquidator cannot, of course, bring the action before he or she is appointed and so the action cannot be brought at a time prior to the order or the resolution to wind up the company.

138 *Thirdly*, the character of voidableness is not drawn from any breach of duty of the creditor or the creation or emergence of a contingent or nascent right or equity of the debtor to have the preferential transaction set aside and any payment disgorged. In particular, the nature of the unfair preference in s 588FA(1), the character of an insolvent transaction under s 588FC, and the voidable nature under s 588FE are all conditioned, in respect of an unfair preference, on objective facts. As between debtor and creditor the debt is paid and discharged. There is no contingent right or equity, or obligation to have repaid, or to repay, the payment. At the time of the transaction the liquidator does not exist in that he or she has not been appointed. Looking at the matter knowing of the company’s financial position, one may, depending on the facts, foresee the risk or possibility or likelihood of a winding up. That depends on the facts and what one knows. It gives no conditional or contingent right to the company and creates no conditional or contingent obligation upon the creditor, to the company or to anyone else.

139 *Fourthly*, the order for payment to the company under para 588FF(1)(a), on the application of the liquidator is different in form to the order made in *Kratzmann (No 2)*, being payment to the respondent (to the proceedings in the High Court) being Mr Tucker the liquidator; though see *SJP Formwork (Aust) Pty Ltd (in liq) v Deputy Commissioner of Taxation* [2000] NSWSC 604; 34 ACSR 604 and *Cook v Italiano Family Fruit Company Pty Ltd* [2010] FCA 1355; 190 FCR 474 at 487 for a different view. However, the judgment of Stephen, Mason, Aickin, and Wilson JJ in *Octavo Investments Pty Limited v Knight* [1979] HCA 61; 144 CLR 360 at 372 makes clear that the proper order was payment to the company. The liquidator is, nevertheless, the proper plaintiff in the proceeding: *Re Fresjac Pty Ltd (in liq); Campbell v Michael Mount PPB* (1995) 65 SASR 334 at 343. This must be so under the Act given the express words of s 588FF(1): “on the application of a company’s liquidator”. There is no right of action of the company: *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2014] NSWCA 148; 87 NSWLR 728 at 749–750 [127].

140 *Fifthly,* the substance of what is occurring in the action under s 588FF has some differences from the recovery action before 1992 based on the 1966 Act. Before the 1992 Act, the 1966 Act made relevant to corporate insolvency made the transaction void against the liquidator, leaving him or her to general law remedies, including the action for money had and received. Under s 588FF upon the satisfaction of the court that the transaction is voidable because of s 588FE orders can be made remedying the changes made by the transaction which, if allowed to be effectual, would dislocate the statutory order. Thus, the Act has changed the remedial tools, in particular making them more flexible, though the flexibility of equitable orders in aid of, and consequential upon, a declaration of a preference under the 1966 Act should not be underestimated: cf *Kratzmann (No 2)*. There was, however, no change to the fundamental remedial purpose of the orders: to remedy the dislocation of the statutory priorities of distribution.

141 *Sixthly*, though an interlocking structure is set out in Div 2 of Pt 5.7B, it does not necessarily follow that each voidable transaction engages identically with s 553C. The conception of mutuality underpinning s 553C is the equity of fairness and justice born of mutual reciprocity. The nature and subject of each type of voidable transaction, and the legal policy drawn from each relevant provision in respect thereof, must be examined and taken account of in considering the application or engagement of s 553C. In this respect, whilst in respect of each voidable transaction there may be one set of rights, how they are described or characterised depends upon why the question that calls for the description or characterisation is being asked, being the purpose at hand. As Kitto J said in *Livingston* 107 CLR at 448 “Which description [of one set of rights] is to be used on a given occasion is a question of appropriateness to the purpose in hand.” Justice Kitto went on to say, in rejecting the use of universal definitions of equitable property, that “for the purpose of solving a concrete legal problem with respect to such a set of rights, more hindrance than help is likely to come from an attempt to classify them according to Austinian terminology as rights *in personam* or *in rem*.” Here, each voidable transaction comes from certain circumstances, some born of contravention of the Act, some not; all actions being brought by the liquidator; and each action has its own evident statutory purpose. All these matters may affect the description or characterisation of the action or the remedial proceeds of the action for the purpose of considering reciprocal mutuality under s 553C. This perhaps is most evident in considering the case of *In the Matter of ACN 007 537 000 Pty Ltd (in liq) & Parker* [1997] FCA 1264; 80 FCR 1 (***Re Parker***), below.

142 *Seventhly*, by way of note, the matters in s 588FG(1)(c) correspond with the suggested preclusion in the draft legislation C9(2) in Appendix A at 153 of Volume 2 of the Harmer Report. (See [102]–[106] above.)

143 It is necessary to say something more about the significance of the character of the funds ordered to be paid to the company under s 588FF(1) on the application of the liquidator. If a set-off under s 553C is available between a debt of the company and the obligation of the preferred creditor to pay money under s 588FF(1) the character of the funds must be such as to reflect the underlying mutuality. In particular, the character of the funds must reflect that the two debts or obligations are between the same parties in the same interest. For mutuality to be present the character of the funds must, in point of *relevant* beneficial entitlement (in the sense discussed in *Hiley* and *Gye v McIntyre*) reflect the nature of the legal right of the company, the enforcement of which produces the recovery payment, that is in the same interest as the creditor is owed the debt beneficially. The statute provides for the moneys to be paid to the company: s 588FF(1)(a) and (c). The nature of that payment and receipt was discussed by Barrett JA in *Fortress* 87 NSWLR at 749–750 [125]–[129] (in a way unaffected by the decision on appeal in the High Court: *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2015] HCA 10; 254 CLR 489 or in the cognate judgment *Grant Samuel Corporate Finance Pty Ltd v Fletcher* [2015] HCA 8; 254 CLR 477). In speaking of all the voidable transaction provisions in Div 2 of Pt 5.7B, his Honour said as follows:

[125] In the form in which they have existed since 1993, the voidable transaction provisions in Pt 5.7B Div 2 of the *Corporations Act 2001* (Cth) serve the purpose of redressing imbalance to the detriment of the general body of creditors resulting from favourable treatment of certain persons in transactions undertaken while the company was still a going concern.

[126] The unstated premise is that certain forms of activity in the period leading up to the commencement of winding-up interfere with due operation of the *pari passu* principle by causing to be in other hands resources that should form part of the insolvent estate for the benefit of creditors as a whole.

[127] **The voidable transaction provisions do not create any right of action in the company. Nor do they allow the liquidator to recover. They enable the liquidator, as the official charged with the task of collecting and administering the insolvent estate, to seek the assistance of the court in augmenting that estate for the benefit of creditors by countering the effects of pre-liquidation transactions of certain kinds.**

[128] **When I refer to augmenting the insolvent estate for the benefit of creditors, I intend to recognise the reality that, although in a simple s 588FF(1)(a) case, the order is an order for the payment of money “to the company”, the right by virtue of which the money is received is a right of neither the company nor the liquidator; that the company has no capacity to mount a recovery action; and that the benefit of the recovery inures wholly for the benefit of the persons who will participate under the winding-up. Among early cases under the present provisions in which this was recognised are *Tolcher v National Australia Bank Ltd* [2003] NSWSC 207; (2003) 174 FLR 251 and *Tolcher v National Australia Bank Ltd* [2004] NSWSC 6; (2004) 182 FLR 419. The provisions now in force share with their predecessors the characteristic that they are “only intended to apply in … a winding-up and for the benefit of the general creditors”:** *Willmott v London Celluloid Co* (1886) 34 Ch D 147 at 150 per Cotton LJ (and see *In re Yagerphone Ltd* [1935] Ch 392; *N A Kratzmann Pty Ltd v Tucker* (No 2) (1968) 123 CLR 295).

[129] Because the voidable transaction provisions represent part of the machinery that the legislation puts at the disposal of a liquidator to assist in assembling the pool of assets from which claims cognisable in the winding-up will be satisfied, the s 588FF(3) time limit is principally concerned with the conduct of liquidators. The section regulates liquidators by instilling a sense of due dispatch in the pursuit of claims with a view to augmenting that pool. Liquidators are told, in effect, that it is their duty, generally speaking, to initiate any voidable transaction proceedings within the specified three-year period; and that, if there is good reason to think that further time is needed, they must, before the expiration of the three years, make an application to the court with a view to persuading it that an extension should be granted. The clear expectation is that liquidators will, within the three years, do two relevant things: commence all such recovery actions as available evidence and resources make it feasible and sensible to pursue; and consider whether there are genuine prospects that pursuit of other recovery actions might prove to be feasible and sensible if further time is made available.

(Emphasis added.)

144 With respect, I agree with these remarks. In *Lane* 385 ALR 92 at [145]–[149], I dealt with the matter similarly. See also *Re Starkey* at 152–154. That the unsecured creditors will benefit in the administration from the receipt of the funds paid under the order does not lead to the conclusion that the funds are not the company’s or are held by the company on trust for the creditors in the sense of the creditors acquiring a beneficial interest or ownership distinct from the beneficial ownership of the company: *Franklin’s Selfserve Pty Ltd v Federal Commissioner of Taxation* [1970] HCA 33; 125 CLR 52; *Federal Commissioner of Taxation v Linter Textiles Australia Limited (In liq)* [2005] HCA 20; 220 CLR 592 at 612–613 [52]–[55] and *Re Starkey* at 154. This marks out a different doctrinal approach to the question of the beneficial ownership of property by a company in liquidation between Australia and England: see Meagher RP, Heydon JD, Leeming MJ and Turner PG, *Meagher Gummow and Lehane’s Equity: Doctrines and Remedies* (5th ed, LexisNexis Butterworths, 2015) at 118–120 [4-115]–[4-120].

145 The enquiry presently at hand being the genuine mutuality of debts, credits or mutual dealings, however, is not simply satisfied by an answer as to who has beneficial ownership of funds received by the company pursuant to an order under s 588FF(1). The question as to who has beneficial ownership is not a question to be answered once, for all purposes. Here, under an order under s 588FF(1), the funds are paid to the company. They are not held on trust for the creditors. They are under the control of the liquidator to be employed pursuant to the statutory order, affected, if relevant, by equitable considerations such as discussed in *Lane* at [147]–[148]. That statutory order provides not only for creditors, but also for the costs of the administration and for some creditors, such as employees, to have priority.

146 The creditor relied on a passage from the judgment of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ in *Linter* 220 CLR at 612–613 [54], being the passage emphasised below. The context was the proper construction of the phrase “beneficially owned” in s 80A(1) of the *Income Tax Assessment 1936* (Cth). The Commissioner of Taxation had submitted that in that context the phrase meant the ability of the Linter Group to use its shares in Linter Textiles for its own benefit, by sale and application of proceeds of sale as it saw fit. It was submitted that this had been lost because in insolvency the liquidator was bound to apply the proceeds of sale in accordance with the statutory regime. That submission was rejected by their Honours, saying at 612–613 [52]–[55]:

[52] The term "beneficial" is usually employed in trust law as a cognate of "beneficiary". That term identifies those persons for whose benefit the trustee of a private trust (ie not a charitable purpose trust) is bound to administer the trust property. Where A holds Blackacre on a bare trust for B, it may accurately be said that B is the beneficial owner.

[53] But that use of the word "owner" does not entail enjoyment by B of all the rights which the law as a whole confers in relation to Blackacre. Thus, as Hope JA explained in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [66], although B may be entitled by equitable remedies to be put into possession, B cannot sue A in ejectment. Again, the will or settlement conferring an equitable fee simple may qualify that gift and render it determinable by the conferral upon another of an option to purchase, or by the imposition of a condition subsequent which is certain and does not contravene the policy of the law.

[54] The authors of a leading Australian text correctly wrote as follows of the effect of a winding‑up order:

**Whether the company is insolvent or solvent, the company holds its property beneficially but subject to the statutory scheme of liquidation under which the liquidator is to pay creditors and distribute any surplus among members. Unsecured creditors and contributories have the benefit of the liquidator's administration of the company's estate. Their special interest is to some extent like that of objects of a discretionary trust; they have a right to have a fund of assets protected and properly administered.** That interest, although not an interest in specific assets, will be protected against third persons. For example, a holder of an unregistered registrable charge who asks the court to extend the time for registration or a person who seeks rectification of an instrument of charge which could prejudice unsecured creditors will not ordinarily succeed if the company is in liquidation or on the verge of liquidation.

The critical point is that the change in control of the affairs of the company has no impact upon its beneficial ownership of its assets.

[55] By analogy with the general law, the circumscribing or suspension by reason of the appointment of the liquidator of the exercise by the usual organs of the company of the incidents of ownership of the assets of the company does not mean that the company itself has ceased to own beneficially its assets within the meaning of s 80A(1). Power to deal with an asset and matters of ownership or title are not interchangeable concepts.

(footnotes omitted; emphasis added)

147 The creditor here sought to use the emphasised portion of the approved quotation from the cited text (Ford HAJ, Austin RP, Anderson C, and Morrison DS, *Principles of Corporations Law* (7th ed, Butterworths, 1995) at 1013) to support the submission that the company in liquidation is therefore the beneficial owner of proceeds of a recovery action under s 588FF. Thus, it was submitted, the character of mutuality is satisfied for s 553C.

148 With respect, that is to take one description of the rights of ownership of the company for one purpose and use it mechanically for another purpose. This is the type of approach criticised by Kitto J in *Livingston* at 448. The context here is the question of reciprocal mutuality. The company is paid the money in the context described by Barrett JA in *Fortress*. The money is received by the company not on trust for the creditors, but nevertheless in virtue of the interest and right, and for the benefit of all those entitled in the administration: all creditors, including priority creditors, and those charged with administering the estate and expending money therefor. That interest, right and benefit does not give those parties beneficial ownership of, or a beneficial interest in, the property constituting the estate, just as beneficiaries under a discretionary trust or legatees interested in an unadministered estate do not have such beneficial ownership or interest. But that does not lead to a conclusion that the notion of mutuality is satisfied in the sense that the company is entitled to the funds in the same interest as it is liable to the creditor for the debt and the creditor is entitled to receive the debt the subject of the asserted set-off. Beneficial ownership may be one characterisation for a purpose in question; an answer as to beneficial ownership does not detract from the proper characterisation of the action not as that of the company but as that of the liquidator, not as agent of the company vindicating any vested or contingent right of the company, but in his or her own right vindicating his or her own statutory rights and duty to augment the estate for the benefit of all creditors. The money is received by the company beneficially in one sense, but in virtue of the interest and right, and for the benefit of those interested in the estate: the creditors, and those charged with its administration, pursuant to the statutory order: see *Sheahan v Carrier Air Conditioning Pty Ltd* [1997] HCA 37; 189 CLR 407 at 428; *Willmott v London Celluloid Company* (1886) 34 Ch D 147 at 149–150; and *Kratzmann (No 2)* at 299–302. The money is received by the company not in the interest of a creditor receiving payment of a pre-existing debt or of an obligation owed to it by the creditor and vindicated by the action. It is received consequent upon the liquidator exercising his or her important statutory right in the performance of his or her important statutory duties.

149 The reliance by the creditor upon *Re Starkey* at 154 is subject to the same considerations.

150 It is delusive and productive of error to search for universal definition of equitable proprietary interests by reference to fixed, universal and exhaustive criteria: *Meagher Gummow and Lehane’s Equity: Doctrines and Remedies* (5th ed) at 107 [4-010]. Likewise it is productive of error to fix upon characterisation or to give a description of equitable interests for one purpose and use the characterisation or description as if it were a thing available for use, almost mechanically, for another distinct purpose or other distinct purposes: *Livingston* at 448. As Kearney J said in *Burns Philp Trustee Co v Viney* (1981) 2 NSWLR 216 at 223–224:

… The administration of equity has always paid regard to the infinite variety of interests and has refrained from formulating or adhering to fixed universal and exhaustive criteria with which to deal with such varying situations. The approach traditionally adopted by equity has been to retain flexibility so as to accommodate the multitudinous instances in which fundamental equitable rules fall to be applied.

As Bell, Gageler and Nettle JJ said in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20; 268 CLR 524 at 561–562 [84], citing Kitto in *Livingston* at 448:

[T]he choice of description should conform to rather than dictate, the application of fundamental principles to ‘solving a concrete legal problem’.

151 That the funds are beneficially those of the company for one purpose does not answer the question of mutuality for the purposes of s 553C, in its statutory context. For the purposes of reciprocity and the statutory purpose within s 553C, the funds are received in virtue of the interest and right, and for the benefit of the creditors and those charged with the administration. This is not in the same interest as the company was liable for or the creditor entitled to receive the second debt of the company to the creditor.

152 It is necessary then to return to s 553C. It is clear from the discussion earlier in these reasons that the legal context of the enactment of s 553C and the provisions in Div 2 of Pt 5.7B was that the obligation to repay or disgorge a preference could not be set off under s 86 of the 1966 Act. No part of s 553C or Div 2 of Pt 5.7B provides a foundation for any different view. Section 553C is available to provide the foundation of the proposition that a payment made to a creditor or the release of a liability of the creditor within the relevant period when the company is insolvent does not have the effect of a preference if the circumstances are that there was a countervailing payment or a release of liability by the creditor. Such can be seen in the circumstances with which Lindley LJ was dealing in *Re Washington Diamond*, with which the Full Court was dealing in *Re Lazarotto*, and with which Robson J was dealing in *Jetaway Logistics*. In these cases there was no injury, because there was no preference – no dislocation of priorities. The payment made was matched by an equivalent payment received or there was an agreement to set off equivalent payments. The place of the set-off provision in such circumstances was in the working out of the contents of the insolvent estate. Here, a creditor is owed more than one debt by the company. The creditor owes nothing to the debtor company. The company makes a payment against one of those debts. The payment discharges the debt to the creditor. There is no contractual, legal, equitable, or statutory right of any kind (vested or contingent) in the company to call for repayment. There may or may not in the future be a winding up and an order of the Court under s 588FF. The payment is made in the relevant period when the company is insolvent. The transaction is voidable under ss 588FA and 588FE. The payment would cause a dislocation of the statutory order by satisfying s 588FA(1)(b). The right to apply for an order can only be made by the liquidator, on or after his or her appointment, thus after the relevant date. The company has no right to bring the action. The liquidator makes the application as part of his or her duties to administer the insolvent estate. The money upon disgorgement is held as described above, and as described in *Linter,* by Barrett JA in *Fortress,* in *Re Starkey* at 152­–154, and in *Lane* at [145]–[149].

153 In such circumstances, the debts are not, and cannot be, mutual. One debt was owed by the company in its own right to the creditor arising out of historical events in the ordinary course of business dealings. The other obligation to pay is payable by the creditor to the company not as its pre-existing creditor, but pursuant to an order of the court obtained by the liquidator pursuant to his or her rights and exercising his or her statutory duties. Whilst in one sense the payment is received by the company beneficially, it is not payable to, or received by the company in virtue of its own interest or right, or for its own benefit, but in the interest or right, or for the benefit (through the liquidator) of all creditors and for the estate’s administration, under a statutory regime. The creditors of the estate have no beneficial interest in the funds received, but the funds are paid and received in virtue of their and the administration’s interest and right and for their and the administration’s benefit, under the statutory regime. The place of the liquidator and the general body of creditors is not a matter of equitable ownership, nor, however, is it a matter of mere form, or dry legality; rather it is a matter of statutory, legal and equitable substance, one that denies the character of the recovery as being in the same interest as the company owing the debt to the creditor, for the purposes of set-off.

154 That the right in the liquidator to apply for an order to pay money to the company, albeit beneficially in one sense, but in virtue of the interest or right, or for the benefit of the creditors and the administration of the estate, arose from dealings between the debtor and creditor being the supply of goods and services and the payment therefore does not mean that all that flows from such dealings can be said to be the result of mutual dealings and entitle the creditor to a set-off. There is simply no mutuality between debtor and creditor in respect of the obligation of the creditor to comply with an order of the Court made under s 588FF on the application of the liquidator. It is a new right; and a new obligation; one to cure the dislocation to the order of priorities made by the payment, which discharged the debt, subject to the operation of the statute. The obligation to pay under s 588FF is not owed to the company by virtue of a right it has against the creditor. It is an obligation found in a judgment or order of the Court of which the company is the recipient pursuant to a successful application brought by the liquidator in his or her own right. In that sense, it is not received by the company in the same interest as the company owes the obligation to pay the debt to the creditor or in which the creditor receives payment of the debt. The creditor does not owe the money representing the disgorgement of the preference to the company as a (pre-existing) creditor of it. The sum that is payable under s 588FF is not and cannot be due, even contingently, before the relevant date, indeed before the relevant order of the Court. It is a product of the exercise of the liquidator’s function as the officer charged with collecting and administering the insolvent estate of the company. It is payable to the company, beneficially in one sense, but in virtue of the interest and right, and for the benefit of the general creditors and the administration under the control of the liquidator.

155 Ultimately, the matter is one of statutory construction. The legal context of the provision in question, and the rights and obligations created by the provisions in question deny the character and quality of mutuality to the debt of the company to the creditor and the obligation of the creditor to pay the company under s 588FF. The words of s 553C cannot be read as requiring that the debt owed by the company and the possible future liability of a creditor to pay the company under an order pursuant to s 588FF are mutual debts or mutual credits or what is due from one party to the other in the same interest from mutual dealings. This is especially so in the light of the terms of s 588FI, especially against the background of *Re* *Kratzmann (No 2).* The words of s 553C are to be read in the context of the Act as a whole in a way that conforms with its operation, set in the context of an orderly administration, built on the foundation of genuine mutuality, recognising the importance of the vindication for the general body of creditors of remedies to cure efficaciously the effect of a preferential transaction, of equality of distribution, and of the statutory regime of administration. A conclusion of mutuality for the purposes of s 553C as propounded by the creditor would see a result described at [31] above, including the consequence that proceeds of a preference recovery action under s 588FF would go first to pay (by a set-off) an erstwhile preferred creditor in priority to priority creditors, such as employees of the insolvent company. Such a conclusion offends the notion of fairness that underpins mutuality in s 553C and the statutory order of priority of certain creditors, built in respect of some (in particular employees) upon the protection of the vulnerable. See the discussion of the relationship between equity and corporations law and insolvency in *Jones (Liquidator) v Matrix Partners Pty Ltd; in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* [2018] FCAFC 40; 260 FCR 310 at 339–341, relevantly for present purposes at [112]–[113] and [115]–[116]. Even if one could construct through some logical process of reasoning some contingency at the time of the unfair preference transaction to recover or repay the preference, the application of set-off in these circumstances so ill-conforms with the policy of the Act as to require the conclusion that such contingency is not apt to give rise to mutuality for the purposes of the Act. However, for the reasons given there is and was no such contingency at or after the time of the transaction until the bringing of the proceeding under s 588FF by the liquidator.

156 The words of judges in cases are not statutory expressions to be construed. Nothing in *Hiley*, *Day & Dent Constructions* or *Gye v McIntyre* requires an inflexible or impractical application that produces a result that sees preferential dislocation of statutory order of priorities caused by a payment unremedied by a successful preference action. These cases are to be read and understood against the legal context that I have described: the clear rejection of the proposition that there can be a set-off of the obligation of the creditor to disgorge a preference under a statutory provision (here, s 588FF) and another pre-existing debt of the insolvent company. If such were the case, the arbitrary result referred to at [31] would obtain. The words of s 553C should not be interpreted to bring about such an arbitrary result dependent upon the position of the creditor and the debtor in question, and divorced from the state of the company’s affairs and the interests of the general body of creditors when there has been found to be a preference. This is not to be answered by saying: “If the statute so applies so be it.” The different equities of mutuality and equality of distribution should engage harmoniously through fairness. That engagement should not produce an arbitrary failure to remediate the giving of a preference. The clearest statutory text would be required to lead to such a conclusion. No such clear statutory text is present here.

157 In any event, none of the expressions of principle in *Hiley*, *Day & Dent Constructions* and *Gye v McIntyre* provides any textual foundation for the conclusion of mutuality here. There are no rights vested in the company or obligations vested in the creditor to repay the preference which “without any new transaction” grow in the natural course of events into [a] money claim” (Rich J in *Hiley* at 487); nor is there any contingent right of the company or contingent obligation of the creditor to the company, or to the as yet unappointed liquidator (Dixon J in Hiley at 496–500 and the Court in *Gye v McIntyre* at 623–624). There has been no necessary breach of a legal duty by the company or the creditor in making or taking the payment. The Act may or may not be satisfied in the circumstances to warrant a court being satisfied that the transaction is voidable. Whilst the circumstances at the time of the transaction may give cause to think that there is a risk that in the future a court will be satisfied that the transaction is or was voidable as an unfair preference, such a risk is not a contingency at least for s 82 of the 1966 Act: *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; 234 CLR 52 at 66 [36], and equally so for s 86 of the 1966 Act, and by parity of reasoning, for s 553C of the Act. A contingency in the context of a contingent creditor requires an existing obligation and out of that obligation a liability to pay a sum on money will arise in a future event whether the event be one that must happen or only may happen: *Community Development Pty Ltd v Engwirda Construction Company* [1969] HCA 47; 120 CLR 455 at 459 per Kitto J (Barwick CJ and Windeyer J agreeing) referred to with approval in *Foots v Southern Cross Mine Management Pty Ltd* 234 CLR at 66 [36] and see also *National Bank of Australasia Ltd v Mason* [1975] HCA 56; 133 CLR 191 at 201 where Barwick CJ, also citing *Re William Hockey Ltd* [1962] 1 WLR 555,referred to the importance in the definition of contingent creditor of the insistence on the presence of an existing obligation out of which the ultimate liability will grow.

158 The creditor relied upon the decision of the United Kingdom Supreme Court in *Re Nortel Companies* [2013] UKSC 52; 4 All ER 887 which dealt, relevantly, with when a contingent liability arose under a statute for the purposes of proof in insolvency. To the extent that there is anything in in *Re Nortel* that is or may be to the contrary of these decisions of the High Court it cannot be determinative. However, as Lord Neuberger said at [77]: “… the mere fact that a company could become under a liability pursuant to a provision in a statute which was in force before the insolvency event, cannot mean that, where the liability arises after the insolvency event, it [is a contingent liability]”. His Lordship said that it was dangerous to try and suggest a universal formula given the variety of statutes that may arise for consideration, but said that at least normally in order for a company to have incurred a relevant “obligation” it must:

… have taken, or been subjected to, some step or combination of steps which (a) had some legal effect (such as putting it under a legal duty or into some legal relationship), and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If those two requirements are satisfied, it is also, I think, relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or the combination of steps gave rise to an obligation under [the relevant] rule.

159 Contrary to the submission of the creditor *Re Nortel* is not of assistance to its argument. For the reasons already given the objective circumstances that may found the conclusion of voidableness for the purposes of ss 588FE and 588FF do not satisfy his Lordship’s condition (a). The giving of the preference creates no legal duty or legal relationship between the company and the creditor. (Though the same cannot necessarily be said if there is a contravention of the Act by reason of insolvent trading.) Further, the policy of the Act would tend to deny the notion of contingency for the purposes of mutual set-off for the purposes of (c) in Lord Neuberger’s test: see the discussion at [155] above.

160 As a matter of construction of the text of s 553C set against the relevant parts of the Act to which I have referred, set in the historical legal context and having regard to the purposes of the set-off provision and the unfair preference provisions, there can be no set-off between a debt owed by the company to a creditor and the obligation of the creditor to pay moneys to the company under s 588FF upon the satisfaction of the Court that the transaction was voidable as an unfair preference, such order being made on the application of the liquidator.

## The balance of the creditor’s submissions and the cases said to require a contrary conclusion or which must, it is said, be concluded to be wrong or plainly wrong

161 Much of the substance of the creditor’s submissions has been addressed in the reasons above. In substance, the submissions addressed the propositions in the liquidator’s arguments to which reference has been made at [17] above. In dealing with those arguments of the liquidator the creditor submitted that a number of authorities both at first instance, especially *Re Parker*, and appellate, especially *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109; 81 NSWLR 47, needed to be dealt with, and that the Court could not limit itself to unfair preferences, but, in particular, must deal with these cases as dealing with provisions of the Act that were wholly integrated with the unfair preference provisions. The creditor also submitted that it was necessary to address s 468 of the Act and the avoidance of dispositions after the commencement of the winding up, and in that context deal with the important decision of *Shirlaw v Lewis* (1993) 10 ACSR 288.

162 The creditor submitted that the cases prior to 1992 have, on close analysis, been misconstrued and misstated by the liquidator. For the reasons already given that submission is rejected.

163 The creditor also submitted that the liquidator overlooked an important recommendation of the Harmer Report which was not adopted, which would have, it was submitted, wholly aligned s 553C(2) with the preference and other provisions to be the relevant protective measure for all set-off cases. The creditor submitted that Parliament chose not to strengthen the critical protective provision in s 553C(2) in the operation of the set-off provision. This argument, however, understates the role of s 553C(2). The High Court said in *Gye v McIntyre* 171 CLR at 619 that the protection of abuse of sections such as s 553C was twofold: sub-s 553C(2) and also the requirement of genuine mutuality.

164 The submissions of the creditor recognised, however, the duality of the protective features of sub-s 553C(2) and the notion of genuine mutuality being based on the necessity to look at the beneficial entitlement to which Dixon J and Mason J referred in *Hiley* and *Gye v McIntyre*, respectively. The notion of mutuality so understood and based on acts and dealings before liquidation is crucial, it was submitted, to the protection against post-liquidation dealings. Expressed at that level of generality, no criticism can be made of that submission, indeed it reflects the binding authority of *Hiley*, *Day & Dent Constructions* and *Gye v McIntyre*.

165 The creditor submitted that the critical question in any recovery action under Pt 5.7B or s 468 of the Act is whether there were earlier mutual dealings involving rights and obligations, absolute or contingent, which in the events that happened, including those after liquidation, mature inter-pecuniary demands capable of set-off. The creditor emphasised the passages from the judgment of Dixon J in *Hiley* especially those at 60 CLR at 498 and 499. The difficulty for the creditor’s submissions is that (directing oneself to the unfair preference) the liquidator is *not* enforcing a claim or right that forms part of the assets he or she was appointed to administer or that finds its place as a contingent right prior to liquidation. There is in no sense that character of approbation and reprobation that makes denial of set-off unfair. There was no subsisting equitable or legal right or equity of any character or status, vested or contingent, in the company to impugn the preferential transaction.

166 The creditor submitted that on the plain words of the section as applied to the facts s 553C was satisfied here. The mutual dealings were, it was submitted, straightforward: The creditor supplied goods and the company incurred debts to pay for the goods; payments were made from time to time in respect of those supplies and debts. That can be accepted as an adequate description of the mutual dealing, but it gave rise to no right or obligation, vested or contingent in respect of the payment of the purchase price. The creditor submitted that an account must be taken of those relevant dealings at the relevant date. The creditor submitted that the liquidator calling for the repayment of the preference or the uncommercial transaction is in a position no different to the liquidator calling for the repayment of a loan or an advanced deposit on goods not supplied. All that is required, it was submitted, is that genesis of the liquidator’s claim was in mutual dealings before the relevant date. This submission echoed the views of Fletcher Moulton LJ in *Lister v Hooson* discussed at [74] above. It is contrary, however, to the views of Vaughan Williams and Buckley LJJ in that case and it is contrary to the legal substance of the position as explained above, in particular at [77] above. More importantly, the submission goes further than is justified by *Hiley, Day & Dent Constructions,* or *Gye v McIntyre*. It is not sufficient on those authorities to be able to point to events in the past as explaining the right of the liquidator to claim under the statute. For mutuality to exist between the commercial parties (the company and the creditor) there must exist on and prior to the relevant date a right or duty vested or contingent which can be seen in equitable substance to exist at the relevant date in favour of or burdening the respective parties to reflect the mutual debts or credits or the mutual dealings and thereby to give rise to the mutuality of the claim of the creditor and the claim of the liquidator, the latter being in equitable substance referable to the earlier vested or contingent claim of the company.

167 The creditor dealt with eight cases in aid of its arguments: *Re Washington Diamond*, *Lister v Hooson*, *In re a Debtor*, *Shirlaw v Lewis, Re Parker, Hall v Poolman* [2007] NSWSC 1330; 65 ACSR 123, *Buzzle Operations Pty Ltd (In Liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109;81 NSWLR 47and *Smith v Boné* [2015] FCA 319; 104 ACSR 528.

168 I have dealt with *Re Washington Diamond*, *Lister v Hooson* and *In re a Debtor* in some detail. They do not assist the creditor’s position for the reasons that I have identified. It is necessary, however, to deal with some further specific submissions made by the creditor about these cases.

169 As to *Re Washington Diamond*, the creditor submitted that in the passage at [110]–[111] (set out in the whole paragraph at [63] above), Lindley LJ concluded that the payment had the “relevant preferential effect”. With respect, his Lordship did not conclude this. He concluded that the mental element was present. The statute presumed the effect. Lord Justice Lindley found there to be no preferential effect (a concept irrelevant to the United Kingdom preference provision under the 1883 UK Act) by his finding of “no injury”.

170 As to *Lister v Hooson*, the creditor sought to downplay the reasoning of Vaughan Williams LJ and Buckley LJ by the proposition that the case hinged on a particular view of the vesting of property in the trustee in bankruptcy: That is, that the settlement was rendered void only against the trustee, but otherwise remained good. That feature was not a “particular” view, but one fundamental to the insolvency regime relating to the kind of provision in question, as I sought to show by reference to *Brady v Stapleton*, *Williams v Lloyd*, *Burns v Stapleton*, and *Jacques* and as was discussed in *Lane*. Further, the statutory reforms after the Harmer Report continue the notion, though not in terms, by the scheme of ss 588FA, 588FC, 588FE and 588FF. The creditor submitted that the judgment of Fletcher Moulton LJ was “powerful and apposite”, in particular that at the time the creditor receives a payment under a disposition (a settlement or a preference) which may later be deemed void or voidable, the creditor had received it as money had and received, implicitly, to the use of the debtor who had paid it. This was, in effect, submitted to be the contingency in the mutual dealing which enabled mutuality to be satisfied before the relevant date. Such analysis, however, is to misstate the nature of the restitutionary action (that was one in the name and for the benefit of the trustee or liquidator) and so to create a contingent right or obligation where there is none. The liquidator’s or trustee’s right to sue for money had and received prior to 1992 was his or her right. It was *not* the company’s nor the debtor’s right. No contingent right or obligation existed in the payer or on the payee at or prior to the relevant date. The submission impermissibly sought to draw out of the dissenting judgment of Fletcher Moulton LJ a contingent right in the company or debtor to recover and a contingent liability in the creditor to repay or disgorge the payment which is later declared to be void against the trustee or liquidator or to be found to be voidable under s 588FF. It was on this basis that it was submitted that mutuality was satisfied. However, the legal substance of what occurred was not an action for money had and received accrued to the erstwhile debtor payer to which the trustee accedes under s 58 of the 1966 Act or which the liquidator administers. Until action was taken by the liquidator or trustee under winding up or bankruptcy, the payment or transaction was final. The same structure is found in Pt 5.7B.

171 As to *In re a Debtor* [1927] 1 Ch 410, the creditor submitted that the reasons of Astbury J must be understood as limited only to the denial of the ability to set off the repayment against the subject debt. With respect, that is too narrow an interpretation of his Lordship’s reasons. First, Astbury J understood Lindley LJ’s judgment to be addressing “two totally separate debts or credits or debits” in the sense that I have earlier discussed. Justice Astbury was making the point that (were one payment not for a call) there would have been two mutual debits. He was not stating that an obligation to repay a preference could be set off against some other debt other than the subject debt. His Lordship was, of course, directing himself to the £404 1s, but his reasoning is applicable to deny a set-off of an obligation to repay a preference to other debts. The whole passage set out at [85] above makes that clear. The clear rejection of the reasons of Fletcher Moulton LJ in *Lister v Hooson* by Astbury J demonstrates that. The affirmation of *Re Washington Diamond* was for the proposition correctly derivable from it: That mutual debts can be set off by corresponding payments or by mutual release; not that an obligation to repay a preference can be set off against another debt owed to the preferred creditor. Although the other debts were not dealt with directly, the reasoning of Astbury J was wide enough to encompass the denial of the set-off to them.

172 In *Re Parker*, Mansfield J was concerned with the liquidation of a subsidiary company (company B) which owed money to its holding company (company A). The liquidators of company B sought directions from the Court as to whether they were entitled to set off against such indebtedness a claim by company B against company A under ss 588V and 588W of the Act. Section 588V provides for the contravention of that section by a holding company (though it is not an offence: s 588V(2)) if a company which is a subsidiary incurs a debt when it is insolvent or becomes insolvent by incurring the debt or debts including that debt, and at that time there are reasonable grounds for suspecting that the subsidiary is insolvent or would so become insolvent: s 588V(1)(a)–(c), and one or both of subparas 588V(1)(d)(i) and (ii) apply. Subparagraph (i) applies if the holding company or one or more of its directors is or are aware at that time that there are such grounds for so suspecting. Subparagraph (ii) applies if having regard to the nature and extent of the holding company’s control over the subsidiary’s affairs and to any other relevant circumstances it is reasonable to suspect that (A) a holding company in those circumstances would be so aware or (B) one or more of such a holding company’s directors would be so aware.

173 Section 588W provides, in circumstances where the holding company has contravened s 588V in relation to the incurring of a debt by a subsidiary, for the recovery by the liquidator of the subsidiary from the holding company “as a debt due” to the subsidiary and amount equal to the loss or damage suffered by the creditor or creditors who were owed the debt or debts because of the subsidiary’s insolvency, and the debt was wholly or partly unsecured and the subsidiary is being wound up.

174 Two matters should be stated about these provisions. *First*, they are not directed to the protection of the access of all creditors of the one company to equality of distribution. The plain policy of the provision is to protect the subsidiary company and its creditors from wrongful activity of those who can be seen to control the subsidiary: the holding company through its directors. There is no element in the provisions of the need for, or the fact of, the holding company being a creditor of the subsidiary. It is the subsidiary company and its creditors that is and are being protected from wrongful conduct (albeit not characterised as criminal) of the holding company and one or more of its directors. *Secondly*, that feature of the provisions enables the character of the right of action by the liquidator of the subsidiary and the funds received (as a “debt due” to the [subsidiary]) to be seen as having arisen from a wrong (the contravention of s 588V) that was committed by the holding company against the subsidiary, at a time that may well be before the relation-back date for the winding up of the subsidiary and the relevant date for the operation of s 553C in connection with that winding up.

175 It was in this context that Mansfield J found that a set-off was available under s 553C. His Honour rejected three arguments put by the receivers and managers of the holding company as set out at 80 FCR at 9, as follows:

(1) the claim under ss 588W and 588V is but a statutory claim which does not result from any mutual dealings between Amber Ceramics [company A] and Barossa Ceramics [company B] at all;

(2) the claim under ss 588W and 588V could arise only after the commencement of the winding up of Barossa Ceramics on 30 May 1995 and is a claim of the applicant rather than of Barossa Ceramics, whereas the claim of Amber Ceramics arose out of events before that date, so again the necessary mutuality could not exist; and

(3) the relevant date to determine whether a set-off can exist is the date of the winding up resolution, namely on 27 June 1995. By that date as a result of the appointment of receivers and managers to Amber Ceramics, its claim against Barossa Ceramics had vested beneficially in Westpac, so that there was at the critical time no mutuality because the respective claims of Amber Ceramics and Barossa Ceramics were not in the same interests.

176 One can see in (1) and (2) the similarity with the arguments of the liquidator in this special case. One must, however, appreciate and give weight to the statutory context of the provisions in order properly to characterise the nature of any rights or obligations vested or contingent of the subsidiary and holding companies, and so the nature of the action for recovery.

177 As to the first reason relied upon by the receivers and managers of the holding company, Mansfield J accepted at 80 FCR at 10–11 that the two debts were mutual. Though the statutory debt owed by the holding company did not arise from mutual dealings, it was a debt nevertheless, and his Honour said, correctly with respect, relying on *Re Kolb; Ex parte England v Commissioners of Taxation* [1994] FCA 359; 51 FCR 31 at 36 D–E: “There is no reason in logic or principle to exclude statutory debts from the compass of provisions such as 553C.”

178 His Honour then said:

… Although mutual credits and mutual debits will ordinarily result from prior dealings between the two parties, I do not think that is necessarily so. See *Hankey v Smith* (1789) 3 T R 507n; 100 ER 703; *Forster v Wilson*. As the Court in *Gye v Mcintyre* said (at 623): "the word 'mutual' conveys the notion of reciprocity rather than of correspondence." The broad purpose of s 553C would be frustrated rather than fulfilled if it were interpreted to require "mutual credits" or "mutual debts" to be defined so as to include not just the elements of mutuality the High Court has identified, but also that they must arise out of mutual dealings. The addition of the expression "or other mutual dealings" was not intended to limit the scope of those expressions, but to extend the circumstances of set-off to claims later crystallising from dealings before the bankruptcy, or winding up, which were capable of and did later give rise to mutual claims: see *Gye v Mcintyre* at 623. …

179 His Honour then discussed at 80 FCR 10–11 why it would be contrived to attempt to interpret the events and circumstances as “mutual dealings”. The debts were mutual in that they were reciprocal.

180 As to the second reason relied on by the receivers and managers of the holding company, Mansfield J first dealt with the fact that the claim was brought by the liquidator, saying at 80 FCR 11:

… I do not think that the fact that the claim against Amber Ceramics must be brought by the applicant in his own name, rather than in the name of Barossa Ceramics, means that there is no mutuality between the claims. As a matter of substance, the claim under s 588W is the claim of Barossa Ceramics. Section 588W(1) explicitly says that the amount of any claim arising by reason of contravention of s 588V is recoverable "as a debt due to the company". The fact that the claim may be enforced by the liquidator is but the procedural device for enforcing what is clearly a claim of the company.

181 Implicit in the above is the nature and purpose of the provisions in question to which I have referred. Sections 588V and 588W have the statutory purpose evident from their terms of protecting the subsidiary and its creditors from conduct of the holding company that is a contravention of the Act. This is the basis for the view (if it be valid) that within this statutory context and to vindicate the statutory purpose the action can be seen as the subsidiary’s in statutory substance. This can be contrasted with the different statutory context and purpose of the unfair preference provision and the recovery for it under s 588FF. The purpose there is to protect the estate from the effects of an otherwise valid *inter partes* transaction that has the effect of dislocating the order of distribution. The right of action in form and statutory purpose is of the liquidator (not the company) in right and interest and for the benefit of the due administration of the estate for all creditors, including priority creditors.

182 Justice Mansfield went on to say (at 11–12) that the “perfection” of the claim by the winding up did not prevent the set-off under s 553C. His Honour at 80 FCR 11–12 directed attention to the fact that the conduct constituting the contravention all occurred prior to the relevant date. In these respects the debt was seen by his Honour as contingent in the sense discussed in *Hiley* and *Gye v McIntyre*.

183 The third reason relied on by the receiver and managers of the holding company involved questions unnecessary to consider for the special case.

184 It is unnecessary to decide upon the correctness of all that was said by Mansfield J. That is so because, contrary to the submission of the creditor, the nature of the statutory provisions (ss 588V and 588W), the proper characterisation of any rights or obligations to which their engagement gives rise, and the proper characterisation of the action and of the proceeds of the action are important in any conclusion as to whether the debt due under the action can be seen as reciprocal or mutual to the debt owed by the subsidiary to the parent. In circumstances where the section can be seen to protect the subsidiary from contravention of the Act by the holding company by providing for an action for the benefit of the insolvent subsidiary against its parent producing a “debt due”, a conclusion that the action and recovery is for the benefit of the company in the relevant sense and can be seen to have grown from a contingency of an earlier contravention of the Act concerned with an injury to the subsidiary is understandable. The legitimacy of the set-off can be seen in the genuineness of the mutuality and in the good sense and fairness of seeing the two debts as mutual. The purpose of the substantive provisions is to protect the subsidiary and its creditors from the effects of the holding company’s contravention of the Act in allowing trading of the subsidiary to continue. In such circumstances, it may be reasonable to view the statutory debt as arising from the earlier contravention and so be contingent by the existence of a form of statutory equity in the subsidiary against the holding company, to be vindicated through any future liquidator. Looked at thus one can see a sense of equitable fairness in a characterisation of genuine mutuality. Such does not, however, tell one how one must characterise a preference action against the preferred creditor in circumstances when the voidableness depends on no wrong or contravention of the Act, gives rise to no contingent right or obligation in statute or equity, and where the very purpose of the action is to recover moneys seen by the section as having been paid not by the company beneficially, but by it from the funds available to the administration. In such circumstances the natural characterisation of the action, the role of the liquidator, and the recovered funds is as described by Barrett JA in *Fortress*. In such circumstances, there is no basis in equitable fairness or in equitable substance to characterise the debts (the liability under s 588FF to repay the unfair preference, and the debt to the creditor) as in any way reciprocal.

185 The decision of Mansfield J in *Re Parker* was followed by Young JA in *Buzzle*. The case was concerned with the liability of directors (under s 588M) for contravention of the Act (being s 588G) for the failure to prevent insolvent trading by company. The relevant provisions had a similar form to ss 588V and 588W. The case against a company which was a creditor of the company in liquidation and the finance director of the creditor company as shadow directors of the company in liquidation failed. The appeal was dismissed. Thus the question of any contravention of s 588G was not necessary to answer for the resolution of the appeal. Justice of Appeal Young, however, conformably with then current practice dictated or influenced by the High Court decision in *Kuru v New South Wales* [2008] HCA 26; 236 CLR 1*,* dealt with all other issues in the appeal including the question of set-off under s 553C if there had been liability proven. In respect of set-off Young JA said at 80–81 [274] and [278]:

[274] The respondents rely on the decision of Mansfield J in the Federal Court in *Re Parker* (1997) 80 FCR 1; (1997) 25 ACSR 560. That was a case where a liquidator recovered under s 588W of the *Corporations Law* a debt from the holding company of a company in liquidation because of insolvent trading (s 588V). His Honour, in a thoroughly reasoned judgment based on authority, held that set-off under s 553C applied.

…

[278] In the circumstances, especially as the point is not determinative, I consider that I should gratefully follow *Re Parker* and hold that, if it had been necessary, I would have declared that set-off was available under s 553C.

186 For the reasons given in relation to *Re Parker*, the question of the correctness of all that was said by Mansfield J (and so Young JA by its adoption, without analysis) need not be decided to resolve the special case.

187 In *Hall v Poolman* [2007] NSWSC 1330; 65 ACSR 123, Palmer J dealt with a complex case concerned with set-off under s 553C for liability under s 588M for insolvent trading. The case also involved a preference given to the Commissioner of Taxation. In dealing with the liability of a director (Mr Irving) of the relevant company (Wines) Palmer J concluded at 65 ACSR 217 [431]:

For these reasons, I hold that Mr Irving is entitled, pursuant to the indemnity deed and under s 553C of the CA, to set off against his liability to Wines under s 588M(2) the amount which he is required to pay to the Commissioner under s 588FGA(2) of the CA.

188 It is unnecessary to deal in detail with his Honour’s reasons. At 65 ACSR 215–216 [418] the above conclusion was explained as follows:

In summary, the position of the parties as at the date of liquidation of Wines was as follows:

* Mr Irving had breached s 588G(2) of the CA and was liable under s 588M(2) of the CA to pay compensation to Wines, recoverable as a debt, if the Liquidators prosecuted a claim. It may be said that Mr Irving was contingently liable for this debt to the company;
* the Commissioner had received preferential payments and was liable to repay them to Wines under s 588FF(1)(a) of the CA if the Liquidators prosecuted a claim. It may be said that the Commissioner was contingently liable for these repayments to Wines;
* the Commissioner could claim indemnity in respect of these payment to Wines from Mr Irving under s 588FGA(2) of the CA. It could be said that Mr Irving was contingently liable for the debt created by s 588FGA(3); and
* if Mr Irving was contingently liable for the debt to the Commissioner, Wines was contingently liable to indemnify him under the indemnity deed and under cl 38.1 of the constitution.

189 With respect, for the reasons I have given, I consider what appears adjacent to the second dot point to be wrong. As to the question of set-off of the liability under s 588M, for the reasons I have given that is unnecessary to decide.

190 In *Smith v Boné* [2015] FCA 319; 104 ACSR 528in an insolvent trading case involving ss 588G and 588M, Gleeson J followed *Re Parker*, *Hall v Poolman* and *Buzzle* as a matter of comity referring to *Hicks v Minister* [2003] FCA 757 at [75]–[76]. Thus, no analysis of *Smith v Boné* is required.

191 It is necessary, however, to deal with the reasons of Hodgson J (as his Honour then was) in *Shirlaw v Lewis* (1993) 10 ACSR 288. The creditor submitted that for the liquidator to succeed in this special case the Court must conclude that Hodgson J was wrong in *Shirlaw v Lewis* in concluding that a set-off under s 86 of the 1966 Act was available in the circumstances before him. Consideration of the decision and its influence on the outcome of the special case requires close attention to the facts and to the reasoning of Hodgson J.

192 In and prior to 1990, a company called Australian Hospitality Management Pty Ltd (**AHM**) owned a nightclub business in Sydney called The Asylum. On 25 January 1990, receivers (the defendants) were appointed to AHM. On 18 April 1990, the receivers entered into an agreement for the sale of the nightclub business to a company called Petty Cash Pty Ltd (**PC**) for $85,000, plus the price of stock of the business including liquor stock. Completion was to be on 18 October 1990. PC entered possession on 4 May 1990, and paid rent and liquor licence fees up to and including November 1990. Completion did not take place on 18 October. Having breached certain terms and not having paid rent or liquor licence fees in December 1990 and January 1991, on 6 February 1991 PC purported to terminate the agreement. On 22 February 1991, AHM accepted the purported termination as a repudiation. It was agreed before Hodgson J that there was a repudiation on 6 February 1991 and that the acceptance of it on 22 February 1991 put an end to the agreement.

193 A clause of the purchase agreement (cl 5.12) provided for the consequences of termination by AHM for default of PC. Upon resumption of possession AHM “will purchase from [PC] all of [its] goods and saleable stock in trade used in the … Business and on the Premises at the date of termination … at the value thereof …”.

194 On 28 February 1991, a summons to wind up PC was filed in the Supreme Court of New South Wales. A liquidator was appointed to PC on 18 April 1991.

195 Meanwhile, on 13 March 1991 the receivers re-took possession of the nightclub and of the liquor stock previously owned by PC to the value of $23,997.04. The receivers operated the nightclub from 13 March 1991 until 18 May 1991 when they sold the business and in doing so they sold some or all of the liquor stock.

196 Proceedings were commenced by the liquidator (as first plaintiff) and PC (as second plaintiff) against the receivers for conversion of the liquor stock on the basis of the avoidance of the agreement on 13 March 1991.

197 The receivers gave evidence, which was accepted, that they were unaware of the winding up proceedings or of the summons until the liquidator contacted them on 22 April, 1991, four days after the winding up order was made and the liquidator appointed.

198 Meanwhile, in mid-February 1991, an employee of the receivers had agreed with a Mr Visalli, the principal of PC, that he, Mr Visalli, would keep operating the business so that it could be sold as a going concern. Mr Visalli ceased being prepared to do so on 13 March. This explains why the receivers took possession of the business on that date and not earlier. Repudiation and acceptance thereof occurred before the commencement of the winding up on the date of the filing of the summons, but the agreement on 13 March was after the commencement of the winding up.

199 A stocktake was done on or shortly after 13 March to determine the value of liquor stock, to offset this value against the debt of PC to AHM. The value was $23,903.04.

200 The business was run by the receivers until 18 May 1991 when it was sold for $250,000. During this period, 13 March to 18 May 1991, the receivers purchased $34,106.73 worth of liquor. They were left with a closing stock of $17,069 on 18 May. Taking into account the opening stock of $23,903.04 previously owned by PC, the cost of liquor sales was $40,940.77, with gross bar sales of $114,433.78.

201 On 22 July 1991, the receivers lodged a proof of debt of $795,043.16, being damages claimed to be owed from PC’s repudiation of contract.

202 Justice Hodgson was unpersuaded on the evidence of that sum, but accepted that the damages were substantial and very much in excess of the approximately $23,000 claimed by the plaintiffs for damages in conversion, being the value of the liquor stock taken over on 13 March.

203 The claim brought by the liquidator and PC was under s 468 of the Corporations Law, sub s (1) of which was as follows:

(1) Any disposition of property of the company, other than an exempt disposition, and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court is, unless the Court otherwise orders, void.

Relevantly, the provision is identical to s 468(1) in Div 1 of Pt 5.4B of the Act.

204 To recapitulate: The contract giving the rights in cl 5.12 was entered into on 18 April 1990. PC repudiated the contract on 6 February 1991, which was accepted on 22 February 1991. The receivers did not take possession until 13 March 1991. Prior to then, and after the repudiation on 6 February, they had in mid-February sought and obtained (until 13 March) the agreement of Mr Visalli to run the club. The summons was filed on 28 February 1991, marking under the Corporations Law at the time the commencement of the winding up of PC. The stock was used between 13 March 1991 and 18 May 1991. The proceedings were commenced on 28 July 1992.

205 The arguments for the receivers were set out at 10 ACSR 292–293: First, that cl 5.12 gave AHM and so the receivers the benefit of a contract for the purchase of the liquor stock giving AHM and the receivers an equitable title to the stock at the time of the entry into the agreement in 1990, which become a legal right on 13 March 1991. So, it was submitted, there was no disposition for the purposes of s 468, reliance being placed on *Re Country Stores Pty Ltd* (1987) 11 ACLR 385; 5 ACLC 636. Secondly, it was submitted that this was a fair transaction for valuation and in the ordinary course of business. Thirdly, it was submitted, that any indebtedness of AHM to PC on and after 13 March 1991 for the stock could be set off under s 86 of the 1966 Act. Fourthly, any avoidance by s 468 gave the liquidator a right to the stock with the effect of retrospectively making the receivers’ dealings with the stock after the commencement of the winding up on 28 February a conversation.

206 Justice Hodgson found that by the date of the winding up order all of the stock previously owned by PC had been sold.

207 Whilst Hodgson J found that cl 5.12 was intended to apply after termination, he found that the actual agreement to purchase the stock contemplated by cl 5.12 did not arise until 13 March 1991 because possession was not resumed until that point. Thus, he concluded that *Re Country Stores* did not govern the position. In so finding, Hodgson was rejecting any proposition that there was an agreement for sale in 1990 from the entry into the purchase agreement. The agreement for the sale of the stock was made on 13 March 1991. That agreement was to be regarded as a disposition.

208 Importantly, Hodgson J considered the effect on transactions of the avoidance by the provision at the time of the winding up, from the commencement of the winding up. If the disposition was by way of payment the liquidator could claim to be repaid such sum as money had and received. If the disposition was (as here) of goods the liquidator could claim the property or the traceable proceeds of that property. See generally 10 ACSR at 295 (15)–(29). His Honour continued, at 295 (29)–(37), as follows:

… However if, as in this case, the goods have been disposed of, and there are no traceable proceeds of sale in the hands of the person to whom the goods were transferred, I am unaware of any authority that the liquidator has a personal remedy in conversion, or of some other kind, against that person. It seems to me contrary to principle to say that the retrospective avoidance of the disposition can retrospectively make the disposal of the goods a wrongful act of conversion. Nor do I think that the person would be retrospectively made a constructive trustee, liable to account for the proceeds of sale.

209 This expression of view of Hodgson J as to the unavailability of conversion in circumstances of a later avoidance is supported by the decision of the New South Wales Court of Appeal (Allsop P and Handley AJA, Campbell JA agreeing) in *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* [2009] NSWCA 84; 76 NSWLR 195 at [75]–[81] and by the views of Hodgson JA (Meagher JA agreeing) in *Citibank Ltd v Papandony* [2002] NSWCA 375 at [68]. Counsel for the liquidator suggested some form of unjust enrichment action would be available. Justice Hodgson doubted that: 10 ACSR at 295 (38)–(44). Nevertheless, he posited that possibility: that is, some restitutionary action against the receivers for having sold goods the title in the receivers to which had been later avoided by the making of the winding up order, operative from the commencement of the winding up. At this point his Honour came to set-off under s 86 of the 1966 Act. Justice Hodgson said that there could not be seen to have been anything in the nature of *unjust* enrichment because of the availability of set-off. See 10 ACSR at 295 (41)–(44).

210 Approaching the question of set-off under s 86 against a possible action for unjust enrichment, Hodgson J said the following at 10 ACSR 295–296:

… I would, in the first instance, approach any question of set-off, not on the basis that what may be set off is a claim for the price of goods, but rather that what is being set off is a claim of the nature of the claim for unjust enrichment. However, it does seem to me that there have, in this case, been mutual dealings which were undertaken in the first instance through the contract for the sale of the business, well in advance of any question of insolvency or liquidation. What ultimately happened was the crystallisation of mutual obligations arising from these pre-liquidation dealings. It does not seem to me that, on the authority of *Gye v McIntyre*, these mutual obligations as crystallised are matters which would be set off under s 86 of the Bankruptcy Act. Indeed, even if I had come to the view that there had been conversion, it could be contended that set-off would have been available. The taking of the stock was pursuant to a contractual obligation arising out of the pre-liquidation dealings. *Gye v McIntyre* makes it clear that liquidated claims can be set off against unliquidated claims; and it follows a fortiori, I think, that unliquidated claims can be set off against unliquidated claims.

Having regard to the circumstance that the mutual dealings in this case do arise out of, and are the crystallisation of, this original contract entered into well before insolvency or liquidation, I do not see any injustice in that approach, nor do I think there can be any question of unjust enrichment. As regards s 82, in so far as any credit was given, it was given in April 1990, and not in March 1991.

211 A number of points need to be made about these passages. First, notwithstanding Hodgson J’s earlier expressed view as to the inapplicability of *Re Country Stores*, his Honour saw the earlier purchase agreement and cl 5.12 as giving a contingent right to the receivers arising from mutual dealings. Clause 5.12 was not a full blown contract for the sale of the liquor upon possession being taken, but it gave a contingent right within the purchase agreement that was capable of being later acted upon. So much can be accepted. For the reasons already given, that is not the position in relation to an earlier given preference where there is no contingent right or equity of any kind in the company to require repayment. Secondly, if there were a cause of action for unjust enrichment or restitution, it can be seen to be at the suit of both the liquidator and the company. The avoidance by s 468 was, and is, not “against the liquidator”, but generally expressed by the statute, thereby revesting title in property back to the company. That claim in unjust enrichment, at least of the company (and the liquidator’s claim cannot have any higher standing) can be seen as dating from the effective operation of the avoidance: the date of the commencement of the winding up of the company, being under the *Corporations Law*, the date of the filing of the application to wind up PC. Thus, at the date s 86 of the 1966 Act operated, the date of the winding up order, there could be seen to be a claim by PC for unjust enrichment (by the statutory retrospective avoidance of the title of the receivers and a countervailing contingent right in AHM available to the receivers against PC) going to the heart of the claim by PC, which arose from earlier mutual dealings between them being the purchase agreement in 1990 and the rights of AHM in cl 5.12. Again, this is different to the preference action under s 588FF, which is a statutory action of the liquidator, not the company. Remedial orders may be made to pay money to the company. That obligation in the defendant to pay arises in the course of the liquidation and does not exist at the date s 553C operates. The Act does not avoid the preferential transaction for all purposes, nor in one sense at all in the same way as the bankruptcy statute avoids the changes earlier made by the transaction “against the trustee”. The character of the transaction being voidable for the purposes of s 588FE is the subject of a finding by the Court in an action under s 588FF. If the Court is satisfied that the transaction is voidable, one or more of the orders in s 588FF(1) may be made. The provision does not, as did s 468(1) of the Corporations Law in and prior to 1993 at the time of *Shirlaw v Lewis*, or as does s 468(1) of the Act now, avoid, in terms, a disposition of property.

212 Thus, there can be seen in *Shirlaw v Lewis* to be mutual rights as between company and creditor existing at or before the date of the winding up for the operation of ss 82 and 86 of the 1966 Act that may support the operation of s 86 in the circumstances of that case. It is unnecessary to express any concluded view about the correctness of *Shirlaw v Lewis* or about all of the reasoning in it. Success for the liquidator on the special case does not require a conclusion by this Court that Hodgson J was wrong in *Shirlaw v Lewis*. It is unnecessary so to conclude.

213 The Court is answering a question under s 25(6) of the *Federal Court of Australia Act*. It is not appropriate that an opinion be expressed (unless necessary for the answering of the question) as to the translation of the above reasons to other voidable transactions in Div 2 of Pt 5.7B of the Act. I have discussed factors that may attend the consideration of other voidable transactions in Div 2 of Pt 5.7B, and void dispositions under s 468 of the Act. That discussion should not be seen as expressing final views about the operation of other sections not the subject of the question before the Court, especially *Re Parker*, *Buzzle* and *Shirlaw v Lewis*. This qualification is not, however, intended as a weakening or qualification of that which is expressed in these reasons.

214 I am sure that I speak on behalf of the Court in thanking counsel and solicitors for their thoughtful and scholarly submissions which were of great assistance to the Court.

## Orders

215 The question posed should be answered “No”.

216 The parties should submit an agreed order on costs, or file brief submissions if there are competing orders sought in that regard.

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| I certify that the preceding two hundred and sixteen (216) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop. |

Associate:

Dated: 16 December 2021

REASONS FOR JUDGMENT

MIDDLETON J:

217 I have had the considerable advantage of reading the reasons of the Chief Justice which sets out the legislative history of the relevant parts of the Act and the extrinsic materials pertaining to that legislative history. Understanding this context, so comprehensively detailed by the Chief Justice, “has utility if, and in so far as, it assists in fixing the meaning of the statutory text”: see *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] and *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671 [22].

218 Then, as the Chief Justice observed, the task of determining the answer to the question reserved for the consideration of the Full Court is essentially one of statutory construction. The ultimate conclusion is that the relevant legislative provisions deny the character and quality of mutuality to the debt of the company to the creditor and the obligation of the creditor to pay the company under s 588FF.

219 The significant point (again as observed by the Chief Justice) is that the obligation to pay under s 588FF arises from an order of the Court sought upon the application of the liquidator. It is not an obligation owed to the company arising from a right it has against the creditor.

220 I agree with the reasons of the Chief Justice and the orders he proposes.

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| I certify that the preceding four (4) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Middleton. |

Associate:

Dated: 16 December 2021

REASONS FOR JUDGMENT

DERRINGTON J:

221 I agree with the reasons of the Chief Justice. There is nothing which I might add which could possibly improve upon what his Honour has written and anything I did would surely diminish it. I also agree with the orders proposed by the Chief Justice.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Derrington. |

Associate:

Dated: 16 December 2021