FEDERAL COURT OF AUSTRALIA

Action Scaffolding & Rigging Pty Limited (in liq) v Citadel Financial Corporation Pty Ltd, in the matter of Action Scaffolding & Rigging Pty Limited (in liq) [2019] FCA 327

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| File number: |  |
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| Judge: | **GLEESON J** |
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| Date of judgment: | 13 March 2019 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – where liquidator doubts the valid appointment of controller per s 418A(1) of the *Corporations Act 2001* (Cth) – whether there was requisite doubt on a specific ground – declaration that controller did not enter into possession or assume control validly under the terms of a security interest **PRACTICE AND PROCEDURE** – application to set aside subpoena as abuse of process – possible breach of implied Harman undertaking – whether third parties are bound by undertaking – undertaking does not apply where affidavit read and taken into account in decision of Federal Circuit Court of Australia  |
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| Legislation: | *Corporations Act 2001* (Cth) ss 51A, 418A, 434A, 434B*Federal Circuit Court Rules 2001* (Cth) rr 2.08B, 14.11(1)*Federal Circuit Court (Bankruptcy) Rules 2016* (Cth) r 3.03*Conveyancing Act 1919* (NSW) s 12*Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 3*Local Court Rules 2009* (NSW) r 8.10  |
|  |  |
| Cases cited: | *Ashenhurst v Jones* (1745) 3 Atk 270;26 ER 958*Australian Guarantee Corporations Limited v Balding* [1930] HCA 10; (1930) 43 CLR 140*Chatterton v Maclean* [1951] 1 All ER 761*F.Y.D Investments Pty Ltd v Promptair Pty Ltd* [2017] FCA 1097*Hearne v Street* (2008) 235 CLR 125*Helicopter Aerial Surveys Pty Ltd v Garry Robertson* [2015] NSWSC 2104*Native Bond Pty Ltd v Cant* [2015] VSC 203*Netet Pty Ltd v Mott* (1994)13 ACSR 586*PT Limited v Maradona Pty Ltd* (1992) 25 NSWLR 643*Re Charge Card Services Ltd* [1987] 1 Ch 150*Re GM Industries* (1980)*Smith v New South Wales Bar Association* [1992] HCA 36; (1992) 176 CLR 256*SZSLF v Minister for Immigration and Border Protection* [2014] FCA 64*Tasker v Small* (1837) 40 ER 848*Walker v Jones* (1865-69) LR 1 PC 50*Macquarie Dictionary* (Online)  |
|  |  |
| Date of hearing: | 24 July, 26 July and 19 November 2018  |
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| Registry: |  |
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| Division: |  |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords  |
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| Number of paragraphs: | 156 |
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| Counsel for the Plaintiffs: | Mr JG Simpkins |
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| Solicitor for the Plaintiffs: | Results Legal  |
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| Counsel for the Defendant: | Mr P Braham SC on 19 November 2019Mr H Somerville on 24 July, 26 July and 19 November 2018  |
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| Solicitor for the Defendant: | Bridges Lawyers |

ORDERS

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|  | NSD 162 of 2018 |
| IN THE MATTER OF ACTION SCAFFOLDING & RIGGING PTY LIMITED (IN LIQUIDATION) (ACN 119 650 663) |
| BETWEEN: | ACTION SCAFFOLDING & RIGGING PTY LIMITED (IN LIQUIDATION) (ACN 119 650 663)First Plaintiff**JOHN RICHARD PARK AND KELLY-ANNE LAVINA- TRENFIELD AS LIQUIDATORS OF ACTION SCAFFOLDING & RIGGING PTY LTD (IN LIQUIDATION) (ACN 119 650 663)**Second Plaintiff |
| AND: | CITADEL FINANCIAL CORPORATION PTY LTD (ACN 106 654 844)Defendant |

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| JUDGE: | GLEESON J |
| DATE OF ORDER: | 13 March 2019 |

THE COURT ORDERS THAT:

1. Leave be refused to the defendant to re-open its case to rely on the affidavits of Antonio Maiolo and Emanuel Kekatos, each sworn 23 August 2018.

THE COURT DECLARES THAT:

1. The defendant did not enter into possession, or assume control, of the property of the first plaintiff validly under the terms of a security interest in that property, being the deed of charge dated 3 July 2008 given by the first plaintiff in favour of Bibby Financial Services Australia Pty Ltd, on the grounds that the defendant did not acquire any rights under the security interest, either by a right of subrogation at general law or pursuant to s 3 of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), or pursuant to the deed of assignment dated 5 June 2012.

THE COURT FURTHER ORDERS THAT:

1. The defendant pay the plaintiffs’ costs of the proceeding.
2. The plaintiffs file and serve short minutes of any consequential relief sought within seven days of the date of these orders.
3. In the event that any proposed consequential relief is opposed, the plaintiffs are granted liberty to apply to have the matter relisted for argument on the proposed relief.

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

REASONS FOR JUDGMENT

GLEESON J:

1. The first plaintiff (“Action”) seeks, principally, a declaration under s 418A of the *Corporations Act 2001* (Cth) (“Act”) as to whether the defendant (“CFC”), which has entered into possession, or assumed control, of property of Action, did so validly under the terms of a security interest in that property
2. CFC took possession of the assets of Action following the appointment of the second plaintiffs (“liquidators”) on 5 December 2012. CFC purported to act under the terms of a charge described as a fixed and floating charge dated 3 July 2008 (“charge”) given by Action in favour of Bibby Financial Services Australia Pty Ltd (“Bibby”), pursuant to rights purportedly assigned to CFC by a deed of assignment dated 5 June 2012 (“deed of assignment”). CFC also contended that it was entitled to the benefit of the assignment by virtue of its right of subrogation at general law or alternatively pursuant to s 3 of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) (“LRMP Act”).
3. In the alternative, the plaintiffs seek relief under s 434A or 434B of the Act.

# Section 418A

1. Section 418A of the Act provides:

(1) Where there is doubt, on a specific ground, about:

(a) whether a purported appointment of a person, after 23 June 1993, as receiver of property of a corporation is valid; or

(b) whether a person who has entered into possession, or assumed control, of property of a corporation after 23 June 1993 did so validly under the terms of a security interest in that property;

the person, the corporation or any of the corporation’s creditors may apply to the Court for an order under subsection (2).

(2) On an application, the Court may make an order declaring whether or not:

(a) the purported appointment was valid; or

(b) the person entered into possession, or assumed control, validly under the terms of the security interest;

as the case may be, on the ground specified in the application or on some other ground.

1. “Security interest” is defined by s 51A of the Act to mean a “PPSA security interest”; or a charge, lien or pledge.
2. “Doubt” is not defined in the Act. It is an ordinary English word, defined relevantly by the *Macquarie Dictionary* (Online) as follows:

–*noun* **5.** undecidedness of opinion or belief; a feeling of uncertainty.

**6.** distrust; suspicion.

**7.** a state of affairs such as to occasion uncertainty.

1. The plaintiffs accepted that they were required to establish doubt on one or more specific grounds about the validity of CFC’s entry into possession, or assumption of control, of Action’s assets. Once established, the burden of proof then shifted to CFC to demonstrate the validity of its conduct: cf. *Native Bond Pty Ltd v Cant* [2015] VSC 203 at [9].

# Issues for determination

1. The following matters were not in dispute:
2. CFC is a person who has entered into possession, or assumed control, of property of a corporation after 23 June 1993, within the meaning of s 418A(1)(b).
3. CFC entered into possession, or assumed control, of Action’s property, purportedly under the terms of the charge, on about 6 December 2012.
4. The charge was a “security interest” in Action’s property within the meaning of s 418A(1) (although the plaintiffs contended that the charge had been “extinguished” before 6 December 2012).
5. Thus, the following issues arise for determination:
6. At the time of the application to this Court, was there doubt, on a specific ground, about whether CFC, in entering into possession or assuming control of the assets of Action, did so validly under the terms of the charge?
7. If yes, did CFC enter into possession, or assume control of property of Action validly under the terms of the charge?
8. Should the Court make a declaration pursuant to s 418A(2)?

# Evidence

1. Action relied on the affidavits of the second-named second plaintiff, Kelly-Anne Lavina-Trenfield, sworn 12 February 2018 and John McEniery, solicitor, affirmed 12 February 2018 and 25 May 2018.
2. CFC relied upon the affidavits of Rosali Maiolo sworn on 7 May 2018 and Gary Aaron Lissa sworn on 7 May 2018.

## CFC’s application for leave to reopen

1. Following the final hearing and after the Court had reserved judgment, CFC sought leave to reopen to rely on two additional affidavits: one from Antonio Maiolo sworn 23 August 2018 and one from Emanuel Kekatos sworn 23 August 2018.
2. At all relevant times, Mr Maiolo was the sole director of CFC. He was also the sole director of Action between 16 May 2006 and 4 July 2012 and from 9 October 2012. In summary, Mr Maiolo’s affidavit provides evidence that:
3. CFC guaranteed Action’s obligations to Bibby.
4. On 5 June 2012, Bibby, Action, CFC, Mr Maiolo, Citadel Group Holdings Pty Ltd and the then receivers appointed to Action by Bibby entered into a written deed of settlement pursuant to cl 2.2, of which Action was obliged to deliver to Bibby or its solicitors, cash or bank cheques payable to Bibby and/or Action in the “Settlement Amount” of $704,301.00. Clause 2.3 of the deed of settlement was premised on the possibility that “Action or the Guarantors have fully performed their obligations under Clause 2.2”.
5. Part of the “Settlement Amount” was procured by CFC by way of CFC borrowing funds from third parties including $47,301 by Panomeli Pty Ltd and $90,000 by Mr Kekatos. CFC obtained bank cheques from Panomeli Pty Ltd and Mr Kekatos in favour of Bibby. The $90,000 bank cheque was tendered by CFC to Bibby “at settlement of the Deed of Settlement”.
6. At “settlement”, the charge was assigned by Bibby to CFC as guarantor of the debt owed by Action to Bibby.
7. Mr Kekatos is the brother of Mr Maiolo’s brother in law. Mr Kekatos’ affidavit provides evidence that Mr Maiolo asked him to lend CFC some money to assist in it paying out Bibby; and that Mr Kekatos subsequently lent $90,000 to CFC that was repaid by CFC over a period of 6-12 months.
8. The basis of CFC’s application was that the plaintiffs’ case had changed during the course of the hearing. CFC noted that, in its outline of submissions filed before the final hearing, the plaintiffs identified only the following two issues:
9. whether CFC was validly appointed as controller; and
10. whether, at the time of its purported appointment, Action was indebted to CFC in the amount claimed or at all.
11. CFC acknowledged that the issue of whether CFC paid any amount to Bibby “rears its head” in Ms Lavina-Trenfield’s affidavit in support of the application, but contended that this reference “could be only read as relating to the question of subrogation as distinct from the question of the operation of the assigned charge”. CFC contended that the plaintiffs had not raised the following issues prior to their supplementary submissions, served on the final day of the hearing (26 July 2018):
12. that the charge could not be assigned from Bibby to CFC as there were no rights to assign on account of the repayment to Bibby; and
13. if the charge was indeed validly assigned, it secured nothing on the basis of the specific definition of “Secured Money” under the terms of the charge.
14. As Mr Braham SC put it, the plaintiffs’ case (until the supplementary submissions) was to challenge the indebtedness of Action to CFC at the time of CFC’s entry into possession (that is, about 6 December 2012), while the case which emerged challenged the efficacy of the charge from the time of the assignment (that is, 5 June 2012) by disputing that there was a debt secured by the charge at that time.

### Legal framework

1. In *F.Y.D Investments Pty Ltd v Promptair Pty Ltd* [2017] FCA 1097 at [30]-[33], White J set out the relevant principles on an application for leave to re-open as follows:

[30] The principles upon which the Court acts on applications of the present kind are settled. The overriding principle is the interests of the administration of justice having regard to all the circumstances of the case: *Inspector General in Bankruptcy v Bradshaw* [2006] FCA 22 at [24], [26]; *Brown v Petranker* (1991) 22 NSWLR 717 at 728; *Urban Transport Authority of NSW v Nweiser* (1992) 28 NSWLR 471 at 478; *Harrington Smith (on behalf of the Wongatha People) v Western Australia (No 8)* [2004] FCA 338, (2004) 207 ALR 483 at [121]; *Walsh v Greater Metropolitan Cemeteries Trust (No 2)* [2014] FCA 456, (2014) 243 IR 468 at [48].

[31] In *Bradshaw*, Kenny J identified at [24] four overlapping classes of cases in which a court may grant leave to reopen: fresh evidence; inadvertent error; mistaken apprehension of the facts; and mistaken apprehension of the law. Although it is not necessary to categorise the present case into any of those classes, the second and fourth seem to be the most apt.

[32] The matters bearing on the interests of justice in a case like the present are various. They include:

* the public interest (and the interest of the particular parties) in litigation being conducted efficiently and expeditiously;
* the public interest in the finality of litigation, with the consequent expectation that litigants will present all their evidence and submissions at the one hearing;
* the significance of the proposed new evidence and submissions in the context of the trial;
* the explanation for the evidence not having been led at the trial;
* the likely prejudice to the opposing party if the application is allowed;
* the potential detriment to the applying party if the application is refused, and;
* any delay by an applicant in seeking leave to reopen.

[33] Regard should be had generally to the overarching purpose stated in ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth). It is a relevant consideration that evidence was not led, or submissions were not made, at trial because of a tactical decision from which the applying party wishes to resile. It is also relevant that a mistake leading to the matter not having been agitated at trial is attributable to the litigant’s legal representatives and not to the litigant personally. However, the circumstance that the evidence was not led, or the submissions were not made, by reason of the negligence of the party or its legal representatives, is not necessarily fatal to an application for reopening being allowed. In *LED Builders Pty Ltd v Eagle Homes Pty Ltd* [1999] FCA 1141 at [34] Lindgren J said:

Clearly, the fact that a failure to make submissions on a point is, as here, solely attributable to the neglect or default of the party seeking leave will militate against the granting of the application for leave. But it will not necessarily defeat the application in all cases.

1. In *Smith v New South Wales Bar Association* [1992] HCA 36; (1992) 176 CLR 256 at 266-267 Brennan, Dawson, Toohey and Gaudron JJ stated:

If an application is made to re-open on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not to call it, ordinarily that will tell decisively against the application: *Barker v. Furlong* (1891) 2 Ch 172, at p 184; *Hughes v Hill* (1937) SASR 285, at p 287. But assuming that hurdle is passed, different considerations may apply depending on whether the case is simply one in which the hearing is complete … or one in which reasons for judgment have been delivered …. It is difficult to see why, in the former situation, the primary consideration should not be that of embarrassment or prejudice to the other side.

### Consideration

1. This is not a case of “fresh evidence”: cf. *SZSLF v Minister for Immigration and Border Protection* [2014] FCA 64 at [48], contrary to what appeared to be suggested by CFC’s submissions. There was no suggestion that the evidence now sought to be adduced could not have been filed and served in the ordinary course of preparation for the final hearing in this matter.
2. In effect, CFC’s case was that the new evidence was not called at the hearing because the plaintiffs had not identified, as elements of their case, issues relating to “the terms of the charge and the specific payment of Bibby within the context of the operation of the charge (as distinct from the subrogation argument)”.
3. In considering this contention, the following facts are relevant:
4. As early as January 2013, CFC asserted to the liquidators that its rights arose from its entitlement to be subrogated to the position of Bibby as a guarantor of CFC and that it was assigned the charge to secure the payment made by it to Bibby.
5. The liquidators made it plain to CFC that they were not satisfied as to the truth of these assertions through correspondence.
6. The liquidators’ lawyers, Results Legal, asked, by letters dated 14 and 18 January 2013, for the dates that Action’s liabilities to CFC arose and, by letter dated 24 April 2013, noted that “[o]n its face, the Deed of Assignment states that as at 5 June 2012, Action did not owe any amount to Bibby”.
7. Ms Lavina-Trenfield’s affidavit stated her conclusion that CFC was not a creditor of Action on the basis of CFC’s failure to provide the liquidators with any evidence that:
	1. Action is indebted to CFC for any amount;
	2. CFC paid any amount to Bibby on behalf of Action (which would have potentially entitled CFC to rely on the right of subrogation); and
	3. the charge relied upon by CFC to appoint itself as controller secured any amount owed by Action to CFC.
8. CFC did not contend that Action’s indebtedness arose from any other circumstance than its alleged payment to Bibby, or its loan of funds to Action used to pay out Bibby.
9. In its written submissions filed before the final hearing, CFC set out the facts that it contended were relevant, including:

12. On or about 5 June 2012, Action agreed with Bibby that it would pay the sum of $704.301 (“settlement sum”) in full and final settlement of all amounts owed by Bibby to Action.

13. The settlement sum was duly paid, and Bibby retired the receivers and managers.

14. Relevantly, the settlement sum was wholly paid by funds advanced by [CFC].

…

36. This debt is squarely addressed by [CFC’s] evidence which establishes:

…

(iv) the evidence of the assignment of the charge from Bibby to [CFC] is wholly consistent with the existence of the debt on account of the payment to Bibby by [CFC].

…

40. Turning then to the assignment, it seems that the determination of the validity of any assignment rises and falls with the foregoing issue in respect of indebtedness.

1. In closing submissions, counsel for CFC contended that the Court had “significant evidence that the debt was paid to Bibby by CFC”.
2. These facts demonstrate that CFC’s case at trial was not confined to the factual question of the net indebtedness of Action to CFC at the time of its entry into possession of Action’s assets. Rather, at trial CFC sought to run a case based on its payment of $704,301 to Bibby in settlement of Action’s debt to Bibby. CFC identified the assignment of the charge as consistent with the existence of Action’s debt to CFC.
3. The facts set out above also show that CFC’s case reflected its previous contentions to the liquidators, which the liquidators had not accepted. The evidence now sought to be adduced is relevant to CFC’s case at trial and, in particular, whether CFC paid Action’s debt to Bibby. CFC did not attempt to explain why it did not call evidence from Mr Maiolo and Mr Kekatos in support of that case at trial.
4. In that context, it is significant that there is no evidence on affidavit to verify that the application for leave to re-open is solely or even primarily a response to the liquidators’ contention that Bibby had no rights to assign under the charge once Action’s debt to it was fully repaid. I am not satisfied that the application is made in response to the issues raised in the liquidators’ supplementary submissions. Rather, it appears from the proposed evidence that it is principally directed to bolstering CFC’s very weak evidence on the issue of whether CFC paid any part of Action’s debt to Bibby.
5. It is true that it was not until closing submissions that the plaintiffs articulated an argument, based on the statement in the recitals to the deed of assignment (set out in full below), that the purported assignment was ineffective because Bibby, having been paid out, had no rights to assign under the charge. The argument raises a factual question about when Action’s debt to Bibby was paid out. However, Mr Kekatos’ evidence does not address the question of whether Bibby was paid out prior to the purported assignment. Mr Maiolo’s evidence addresses that issue only in the most general of terms.
6. It is also relevant that while the proposed new evidence, if adduced, would strengthen CFC’s case, its weight is uncertain. Importantly, it does not include contemporaneous records of the alleged loans to CFC pursuant to which Bibby was provided with two bank cheques, and it does not attempt to explain the absence of such records. Nor does it explain how the balance of the amount owing by Action to Bibby (the majority of the debt) was repaid. Thus, if leave were granted to re-open, that would necessitate an adjournment to allow the liquidators to make further investigations to test the new evidence; with a view to testing the evidence by cross-examination.
7. In my view, the public interest in the finalisation of this proceeding and in the finalisation of the liquidation both point against the grant of leave to re-open, particularly because CFC has been given an ample opportunity before now to put to the liquidator all relevant information to demonstrate its alleged payments to Bibby.
8. For all of these reasons, it is not in the interests of justice to grant leave to CFC to re-open this case and, accordingly, I refuse to grant that leave.

# Facts

1. CFC was registered as a company in 2003.
2. Action was registered as a company on 11 May 2006. Action operated a business providing scaffolding services to the building industry.
3. Mr Maiolo’s sister, Rosali Maiolo, gave evidence that, from about 2003, CFC was engaged in providing financial lending services to entities within the property and property development industries including entities owned and or operated by Mr Maiolo.
4. Ms Maiolo gave evidence to the effect that, in order to manage Action’s cash flow, CFC maintained a loan account with Action. Pursuant to the loan account, CFC would frequently lend funds to Action, usually by way of making payment of invoices issued to Action on Action’s behalf.
5. According to Ms Maiolo, Action would repay funds to CFC as and when it was able to do so.
6. Action also maintained a debt factoring facility of approximately $1 million with Bibby.

## 2008: Charge

1. On about 3 July 2008, Action entered into a deed of charge entitled “Fixed and Floating Charge” (“charge”) with Bibby. The charge was duly registered with the Australian Securities and Investments Commission (“ASIC”). Subsequently, it was registered on the Personal Property Securities Register (“PPSR”) with security interest number 201112190874790 (“relevant SIN”). On June 2012, the transfer of the charge in favour of CFC was recorded on the PPSR.
2. Clause 2, entitled “Recitals” states:

[Action] has agreed to grant this charge to Bibby for the purpose of securing to Bibby the payment of the Secured Money.

1. By cl 1.1, “Bibby” is defined to mean:

BIBBY FINANCIAL SERVICES AUSTRALIA PTY LIMITED ACN 101 657 041 and includes its successors, transferees and assigns and each and every one of them and their respective successors transferees and assigns jointly and severally.

And “Secured Money” is defined to mean:

(a) all advances, credit, guarantees or other financial or credit accommodation now or in the future made or provided by or on behalf of Bibby or a Related Corporation of Bibby to or on behalf of or at the request of the Company or in respect to which the Company has any actual or contingent obligation or liability;

(b) all moneys which Bibby or a Related Corporation of Bibby pays or becomes liable to pay to or for or on account of the Company either alone or jointly with any other person by reason of Bibby or a Related Corporation of Bibby incurring liabilities on behalf of or at the request of the Company for any reason whatsoever;

(c) all stamp duty credit business duty and all other governmental duties and imposts commissions charges and expenses incurred by Bibby in respect to transactions involving the Company or any Collateral Security;

(d) all moneys which is or may become payable by the Company to Bibby or any Related Corporation of Bibby under this Deed or any Collateral security, whether alone or jointly with any other person including without limitation interest, commission, costs, charges and expenses payable by the Company or incurred by Bibby or any Related Corporation of Bibby or any Receiver or Controller appointed by Bibby or any Related Corporation of Bibby or which may be incurred or become liable to contingently liable for or pay under this Deed or any Collateral Security or in the defence or in aid of its rights and powers under this Deed or any Collateral Security;

(e) all money which the Company may now or in the future actually or contingently be indebted or liable to Bibby or to a Related Corporation of Bibby on any account whatsoever, including, without limitation by guarantee, indemnity or otherwise; and

(f) liquidation or unliquidated damages payable by the Company to Bibby caused or contributed to by any breach by the Company of any provision of this Deed, or by any act or omission of the Company;

…

1. By cl 1.1 of the charge, “Insolvency Event” is defined to include when an order is made that a body corporate be wound up. By cl 9.1(x), an “Event of Default” includes when an Insolvency Event occurs in respect of Action.
2. Clause 4.1(a) provides:

[Action] by way of first charge charges the Mortgaged Property in favour of Bibby to secure payment of the Secured Money.

1. Both parties emphasised cl 4.6, which provides:

Upon [Action] paying to Bibby the whole of the Secured Money and provided that [Action] has performed and observed all obligations under this Deed and any Collateral Security, Bibby will at the cost of [Action] discharge the charge and execute all documents prepared by [Action] as it may reasonably require to effect the discharge.

1. CFC noted that at least three things had to occur in order for the charge to be discharged:
2. payment of the whole of the secured money;
3. performance and observation by the company of all of its obligations under the deed of charge and any collateral security; and
4. payment by the company of the cost of effecting the discharge.
5. The plaintiffs also noted cl 9.2, which provides:

On the happening of one or more Event of Default [sic], the Secured Money will immediately become due and payable without the necessity for any demand or notice being made under section 111 of the Conveyancing Act or section 57 of the Real Property Act and this security will become immediately enforceable, the floating charge will crystallise and the right of [Action] to deal for any purpose with the Mortgaged Property will immediately cease.

1. Clause 10 provides relevantly:

(a) If an Event of Default occurs, Bibby may, by itself, its agent or other representative at any time as and when it chooses at its absolute discretion and without being responsible for any loss, exercise the powers, rights and remedies set out in this clause, and the provisions of section 111 of the Conveyancing Act and section 57 of the Real Property Act requiring notice to be served, and any similar legislation are expressly excluded, except to the extent prohibited by law.

(b) Bibby may exercise all and any of the powers and rights referred to in this Deed including without limitation the powers contained in this clause.

…

(d) Bibby has the power to:

(i) enter upon or take possession of or receive the Mortgaged Property or any part of it (including the income);

…

1. Clause 19(b) provides:

Bibby may at any time assign transfer or encumber all of its rights and obligations under this Deed without restriction including without the approval or consent of the Company.

1. A schedule to the charge lists five collateral securities including:

2. Deed of Guarantee and Indemnity by ANTONIO MAIOLO and CITADEL GROUP HOLDINGS PTY LTD (ACN 105 336 187) and CITADEL FINANCIAL CORPORATION PTY LTD (ACN 106 654 844) in respect of the obligations and liabilities of ACTION SCAFFOLDING & RIGGING PTY LTD (ACN 119 650 663) in favour of BIBBY FINANCIAL SERVICES AUSTRALIA PTY LIMITED (ACN 101 657 041), dated on or about the date of this document.

## 2012

1. In about February 2012, Bibby called in its facility with Action. On 6 March 2012, Bibby appointed receivers and managers to Action pursuant to the charge.
2. On 23 May 2012, Results Legal Solutions (“Results Legal”), on behalf of Technocraft Australia Pty Ltd (“Technocraft”), demanded payment from Action of $68,602.91 by 30 May 2012.

### Deed of assignment

1. By the deed of assignment dated 5 June 2012, Bibby purported to assign to CFC the charge.
2. The recitals to the deed of assignment state:
3. Bibby has provided financial accommodation to Action pursuant to the Facility and in support of such financial accommodation has obtained the Charge.
4. All amounts due to Bibby have been paid and the Assignee seeks to take an assignment of the Charge from Bibby and Bibby agrees to assign the Charge to the Assignee in consideration of the receipt of the Assignment Fee and on the terms and conditions set out in this Deed.
5. Mr Simpkin submitted that, if CFC provided monies to pay out the loan from Bibby (as CFC now contends), it is surprising that the deed of assignment makes no reference to that fact.
6. The evidence included the two bank cheques already mentioned. Both are payable to Bibby: the first is dated 4 June 2012 and is for an amount of $90,000; the second is dated 5 June 2012 and is for an amount of $47,301.00. A letter from Bridges Lawyers, CFC’s lawyers, to Results Legal dated 6 May 2013 states that the bank cheques were provided to Bibby at settlement by CFC. There is no reason to doubt that the bank cheques were given to Bibby in part payment of Action’s debt on or about 5 June 2012.
7. The “Facility” is defined in the deed of assignment to mean “the Invoice Discounting Agreement between Bibby and Action, dated 3 July 2008 (as allegedly varied to a full service factoring agreement)”.
8. The “Charge” as defined in the deed of assignment is the charge.
9. The “Assignment Fee” is defined in clause 1.1 to mean “the monetary amount of $2.00 including GST”.
10. Clause 2 of the deed of assignment provides:

On the Commencement Date, Bibby in consideration of receipt of the Assignment Fee (which Bibby acknowledges receipt of) assigns and transfers to the Assignee, free of any encumbrance, mortgage, pledge, lien or charge all of its rights, titles, interests and entitlements, arising under or in connection with the Charge and Assignee accepts such assignment and transfer.

1. Clause 3 contains the following provision:
	1. To the extent permitted by law … Bibby gives no statutory or other warranties whatsoever, including warranties relating to the Charge, including, without limitation, as to:

(i) The value, extent, condition of any asset of Action subject to the Charge; and

(ii) The enforceability of the Charge.

1. Clause 8 provides:

This Deed record the entire agreement between the parties in relation to its subject matter, and all other understandings, agreements, warranties or representations (whether express or implied) other than those which are set out in writing in this document are excluded [sic].

### Notice of deed of assignment

1. The evidence included a notice of assignment dated 5 June 2012, signed by Mr Maiolo on behalf of CFC, and expressed to be issued in accordance with s 12 of the *Conveyancing Act 1919* (NSW).

### Appointment of liquidators

1. On 19 October 2012, the Supreme Court of New South Wales dismissed Action’s application to set aside a statutory demand served by Technocraft and claiming payment of amounts totalling $68,602.91.
2. On 5 December 2012, the liquidators, who are senior managing directors of FTI Consulting, were appointed liquidators of Action by this Court on the application of Technocraft, following an order that the company be wound up.
3. The plaintiffs acknowledged that there was an “Event of Default” within the meaning of the charge on 5 December 2012 when the winding up order was made.

### CFC takes possession of Action’s assets

1. By letter dated 7 December 2012, Mr Maiolo wrote to Action on behalf of CFC and marked to the attention of the liquidators, as follows:

Pursuant to a Fixed and Floating Charge dated 3 July 2008 (“Charge”) which was assigned to [CFC] on 5 June 2012, [CFC] holds a fixed and floating charge over all of the assets and undertaking of Action.

Pursuant to the Charge, inter alia, the appointment of a liquidator to Action is an Insolvency Event. An Insolvency Event is an Event of Default under the Charge.

[CFC] hereby gives notice that pursuant to clause 10 of the Charge, [CFC] hereby takes possession of and receives the Mortgaged Property (as that term is defined in the Charge) being all assets of Action, as controller.

1. Subsequently, CFC lodged a form 504 “Notification of appointment of controller” and form 505 “Notification of appointment of an external controller”. The forms specify the date of the appointment as 6 December 2012 and indicate that the appointment was by instrument dated 3 July 2008. In each case, the form identifies the instrument as an instrument registered in the PPSR with the relevant SIN.
2. On 10 December 2012, Natasha Jonga of FTI Consulting requested documents from Mr Maiolo, including a copy of the charge, loan documents, a payout figure, appointment documents for the controller, documents in relation to the transfer of the charge on 5 June 2012, and a detailed listing of all the assets of Action of which the controller intended to take possession.

## 2013

1. By letter dated 4 January 2013, Mr Maiolo on behalf of CFC told the liquidators that the payout value as at 31 December 2012 was $1,079,842. CFC again gave notice that:

[P]ursuant to clause 10 of the Charge, [CFC] hereby takes possession of and receives the Mortgaged Property (as that term is defined in the Charge) being all assets of Action, as controller.

1. The 4 January 2013 letter states that it attaches a 5 June 2012 deed of assignment and the original charge document dated 3 July 2008, however, it appears that those documents (and other documents) were provided to the liquidators by an email dated 7 January 2013 from Mr Maiolo.
2. The 7 January 2013 email attached the following documents:
3. an undated and unsigned asset finance agreement between Bibby and Action;
4. an undated and unsigned invoice discounting agreement between Bibby and Action;
5. a PPSR search for Action dated 6 December 2012, noting CFC as a secured party of Action;
6. an ASIC form 309 filed 25 July 2008 exhibiting the charge; and
7. the deed of assignment.
8. By letter dated 14 January 2013, Results Legal, who were now acting for the liquidators, wrote to CFC seeking further information to allow the liquidators to respond to CFC’s request for acknowledgement of their appointment as controller. The information sought included, relevantly:
9. A copy of any written notice of the assignment and details of how it was provided to Action.
10. How the figure of $1,079,842 was calculated with reference to the dates that Action’s liabilities to CFC arose, together with documentation to substantiate the secured amount claimed.
11. By letter dated 17 January 2013 to Results Legal, Mr Maiolo on behalf of CFC provided a copy of the notice of assignment to Action and set out the following facts (errors in original):

1. The Company and Bibby Financial Services Australia Pty Ltd (“**Bibby**”) entered into, inter alia, an invoice discounting agreement (the “**Facility**”) and a fixed and floating charge over the assets of the Company (“**the Charge**”).

2. A guarantor of the obligations of the Company pursuant to the Facility was CFC.

3. Bibby purportedly terminated the Facility and appointed receivers and managers to the Company in approximately March 2012.

4. An arrangement was reached with Bibby whereby the sum of $750,000.00 was paid to Bibby by CFC in order to pay out the Bibby facility.

5. As CFC was the guarantor of the Facility with Bibby, it was entitled to be subrogate into the position of Bibby. As a result, it was assigned the Charge to secure the payment made by it to Bibby.

6. I note you are in possession of the Deed of Assignment of Charge dated 5 June 2012.

7. A copy of the notice of the assignment of the Charge is enclosed.

1. By letter dated 18 January 2013, Results Legal replied to the 17 January 2013 letter, noting that the letter provided some, but not all, of the information that had been requested. Results again sought the following:

1. details of how the notice of assignment was provided to Action;

2. a comprehensive breakdown of how the Secured Amount Claimed is calculated with reference to the dates that Action’s liabilities to [CFC] arose, together with copies of any documents relied upon to substantiate the Secured Amount Claimed, including but not limited to:

(a) copies of any agreements or leases; and

(b) copies of any statements of account or invoices; and

3. any other documents relied upon by [CFC] to support its appointment as controller.

1. Additionally, in view of the matters raised by the 17 January 2013 letter, Results Legal sought the following additional information:

1. a copy of the deed of guarantee and indemnity (**Deed of Guarantee**) by which [CFC] guaranteed the debts of Action to Bibby which is referred to in the deed of charge dated 3 July 2008 (**Deed of Charge**);

2. evidence demonstrating that [CFC] advanced $750,000 to Bibby from its own funds as asserted in your correspondence dated 17 January 2013 including:

(a) copies of all relevant correspondence (including email correspondence) in relation to the advance; and

(b) bank statements and other documents which establish the source of the funds, and the fact of the transfer in favour of Bibby;

3. details of whether the notice of assignment was signed in hard copy or by the affixation of an electronic signature (as appears to be the case from the version sent to our office in PDF form on 17 January 2013). If the signature was affixed in electronic form, please provide a copy of the document in its original format (for example, if the document was created using Microsoft Work, the Microsoft Word version); and

4. copies of the preceding pages 1-8 of the entire document of which the notice of assignment provided on 17 January 2013 is comprised (we note that page number “9” appears on the footer of this document).

1. Results Legal concluded the letter by putting the following argument as to the reasonableness of their request for further information:

It is our client’s position that their (repeated) requests for information and substantiation are more than reasonable and necessary in order to comply with their legal and ethical obligations as liquidators, particularly in circumstances where:

1. the purported secured creditor has a common sole director to the company in liquidation; and

2. the common sole director, Mr Maiolo, has failed to comply with his legal obligations by:

(a) completing and returning to our client a report as to the affairs of Action; and

(b) complying with the section 530B notice to produce books and records provided on or about 5 December 2012.

1. After some unfruitful email correspondence between Results Legal and Mr Maiolo, by letter dated 24 April 2013, Results Legal wrote to CFC complaining that the necessary documents and information required to substantiate CFC’s appointment as controller had not been provided. Results alleged that Mr Maiolo and CFC had engaged in “obstructionist” conduct, and gave examples. The letter stated relevantly:

**Right of subrogation**

If [CFC] did not pay the amount Action owed to Bibby, it cannot rely on a right of subrogation.

If [CFC] did pay a sum of money to Bibby, it would have records to substantiate this fact.

As you have that [sic] failed to provide any evidence that [CFC] paid any amount to Bibby on behalf of Action, our client has no option other than proceeding on the basis that [CFC] did not in fact make any such payments.

Consequently, our client’s position is that [CFC] has no entitlement to rely on a right of subrogation.

**Validity of the Charge and appointment as controller.**

On its face, the Deed of Assignment states that as at 5 June 2012, Action did not owe any amount to Bibby.

Accordingly, as you have failed to provide evidence of how the Purported Secured Amount is calculated, our client has no option other than to proceed on the basis that the Purported Secured Amount does not comprise of any amounts previously owing by Action to Bibby that have been assigned to [CFC].

…

**Conclusion**

[O]n the material presently available to our client, it [is] our client’s position that the purported appointment of Citadel as controller is invalid. This is because:

1. Citadel has no valid legal entitlement to rely on the Charge as security for the Purported Secured Amount and is therefore not a secured creditor.

2. Citadel cannot rely on a right of subrogation as it did not pay any amounts to Bibby on behalf of Action.

If you have any evidence to the contrary, now is the time to provide it to our client.

1. By letter dated 6 May 2013, Bridges Lawyers wrote to Results Legal on behalf of CFC. Relevantly, Bridges Lawyers stated:

5. The actual amount paid to Bibby to resolve its claims, and retire the receivers and managers to the Company, was $704,301.00. We attach, for your attention, two (2) of the bank cheques provided at settlement to Bibby by our client ($90,000.00 and $47,301.00). Our client is currently attempting to obtain additional documents concerning the balance of the moneys paid. However, this may be of little significance, as we understand the amount currently held in the liquidators’ account is substantially less than $137,301.00.

**Right of subrogation**

CFC is a secured creditor of the Company. As it has paid at least $137,301.00, in its capacity as a guarantor of the Bibby debt, it was entitled, as a matter of law, to be subrogated into the position of Bibby and its securities over the Company, in addition to the rights received under the Deed of Assignment. Our client clearly has the right to rely upon the assignment and the right of subrogation. Our client has rights as a matter of law and pursuant to section 3 of the *Law Reform (Miscellaneous Provisions) Act NSW* 1965 to be subrogated into Bibby’s security.

**Validity of charge**

As at 5 June 2012, the Company owed Bibby in excess of $12,000,000.00. The reference in the Deed of Assignment to amounts having been paid to Bibby, was in relation to the settlement amount paid on that day to Bibby as a requirement for the Deed of Assignment. That in no way impinges upon our client’s rights of subrogation or validity of its security. Your reliance upon *Olympic Holdings Pty Ltd v Windslow Corporation Pty Ltd (in Liquidation)* is misconceived and incorrect.

1. The 6 May 2013 letter attached the two bank cheques referred to in the letter.

## 2014: preparation of CFC’s financial statements

1. In May 2014, CFC received notice from the Australian Taxation Office (“ATO”) of its intention to conduct an audit of CFC.
2. Following that notification, CFC engaged Mr Lissa to provide accounting and taxation advice in respect of the audit. Mr Lissa advised Ms Maiolo that it would be necessary for CFC to have complete and accurate accounts to be submitted to the ATO. Mr Lissa advised Ms Maiolo to undertake the following:

(a) obtain all source financial documents relating to CFC being suppliers and customers invoices, creditors and receivables statements, wages records, contracts, loan documents, cheque butts and bank statements for the period commencing with the financial year ended 30 June 2006;

(b) reconcile those source financial documents with all of the transactions recorded on CFC's bank statements;

(c) enter and maintain all transactions in the Xero based accounting system.

1. Mr Lissa is an experienced certified practising accountant who had been engaged by CFC prior to about 2005 and since about 2012.
2. Thereafter, and over a period of about 12 months, Ms Maiolo undertook a process (under Mr Lissa’s supervision) of data entry into CFC’s Xero accounting system concerning the financial transactions of CFC commencing with the financial year ended 30 June 2006. Ms Maiolo entered approximately 22,000 separate transactions contained in over 10 boxes of financial records.
3. Mr Lissa prepared CFC’s accounts for the 2006 to 2014 financial years from the data collected by Ms Maiolo and entered into the Xero accounting system.
4. According to Mr Lissa, a general ledger report for CFC for the financial years 1 July 2011 to 30 June 2013 and a document entitled “Balance Sheet Citadel Finance Corp Pl” (“balance sheet”) prepared by Mr Lissa showed that the loan balance as between Action and CFC fluctuated, such that:
5. as at 1 July 2011, CFC was indebted to Action in the sum of $557,717.26;
6. as at 30 June 2012, Action was indebted to CFC in the sum of $120,488.07; and
7. as at 4 December 2012, Action was indebted to CFC in the sum of $545,860.93.
8. Mr Lissa’s evidence was that the 14 accounts referred to in the general ledger are CFC’s individual accounts relating to Action. Twelve of the 14 account balances do not change from 30 June 2011 to 30 June 2013.
9. As to the other two accounts, account “702 – AS&R” moves from a balance of ($717,249.15) on 5 June 2012, to ($844,531.50) as at 30 June 2012 to ($428,395.00) as at 4 December 2012. Thus, at the relevant times, this account had a substantial balance in Action’s favour. The movement in account “714 – ASR Recoverable Costs” totalled $9,236.36 and comprised four items entitled “EXPENSE” between 5 June and 5 December 2012.
10. The calculation underlying the $545,860.93 was not explained but is likely to be the sum of the balances of the 14 accounts in the general ledger report as at 4 December 2012. There was no explanation of the items said to make up the alleged debt of $545,860.93 beyond the short descriptions of items in the general ledger report and the account names.
11. CFC did not point to any item or items in the general ledger report said to be referrable to the payment of a debt to Bibby by CFC.
12. Ms Maiolo gave oral evidence and was cross-examined. She described her role within CFC as administrative: “[j]ust, basically, filing, making appointments, keeping documents”. Ms Maiolo said that she did “basic bookkeeping”, mainly after the commencement of the ATO audit. Ms Maiolo clarified that she did not create the general ledger report annexed to Mr Lissa’s affidavit: she merely did data entry and did not see a ledger report that reflected her data entry. Ms Maiolo explained:

Basically, what I did was I took the bank statements, the chequebooks and the invoices, and I just entered the invoices, the payments, and reconciled it, and that’s all. And then it was – under the supervision of Gary Lissa, and then it was given – given over to Gary.

1. Ms Maiolo clarified that she entered data from three sources, being bank statements, cheque books and invoices.
2. Ms Maiolo gave evidence that she had searched for a deed of guarantee and indemnity between Bibby and CFC but was not able to locate one. She did not ask Bibby for a copy of the deed of guarantee and indemnity.
3. Mr Lissa was cross-examined briefly. He stated that the primary records used by Ms Maiolo to undertake the data entry task were always located at CFC’s offices and were never removed.

## 2014: Mr Maiolo’s use of Action June 2011 and June 2012 balance sheets

1. By affidavit sworn 24 October 2014 (“Mr Maiolo’s October 2014 affidavit”), proceedings brought by Technocraft against Mr Maiolo in the Local Court of New South Wales (“Local Court”), Mr Maiolo annexed balance sheets for Action dated June 2011 and June 2012.
2. These balance sheets describe, as an asset, a “CFC-loan” in the sum of $1,056,540.57, suggesting that Action was a creditor of CFC rather than a debtor as CFC now claims.

## 2017

1. On 4 April 2017, Results Legal wrote to Bridges Lawyers noting the apparent contradiction between the contents of Mr Maiolo’s October 2014 affidavit and CFC’s claim to be a secured creditor of Action, namely that:
2. on the one hand, Mr Maiolo contended to the liquidators in support of the appointment of CFC as controller that CFC was owed $1 million by Action in respect of advances made by 30 June 2012; and
3. on the other hand, Mr Maiolo had deposed that Action was solvent, including by reason of a loan payable by CFC to Action of $1 million as at June 2012.
4. The circumstances in which Mr Maiolo’s October 2014 affidavit came into the hands of the liquidators are not clear. The Results Legal letter says that the affidavit was discovered by the liquidators “through their own investigations”.
5. Results Legal further:
6. demanded the MYOB data file for Action;
7. demanded an explanation pursuant to s 530A of the Act; and
8. foreshadowed applications:
	1. under ss 530A and 530B of the Act for production of the books and records of Action from Mr Maiolo;
	2. under s 596B of the Act requiring CFC to produce all books and records pertaining to all dealings with, or on behalf of, Action; and
	3. under ss 434A or 434B of the Act to remove CFC as controller.
9. On 11 April 2017, Bridges Lawyers responded, requesting documents referred to in the 4 April 2017 letter. Those documents were provided to Bridges Lawyers by email on the same day.
10. A follow up email seeking a substantive response was sent by Results Legal on 20 April 2017. Further follow up emails were sent on 20 June, 28 June and 29 June 2017.
11. By email sent on 3 October 2017, Bridges Lawyers on behalf of CFC, asserted that:

[T]he liquidators continue to possess funds which are the subject of our client’s security. Our client does not propose to cease as controller in circumstances where a significant sum remains owing to our client.

## Realisation of GST refund

1. During the preparation of the financials, it was identified that a GST refund was due from the ATO to Action.
2. Accordingly, as controller, CFC took steps to realise this asset of Action, being the GST refund.
3. By virtue of the steps undertaken by CFC, the ATO determined that an amount of $104,553.59 was owing to Action in the form of a GST refund.
4. Rather than paying the GST refund to CFC, the ATO instead paid the refund to the liquidators of Action.

# Was there the requisite doubt within s 418A?

1. The originating process was filed on 12 February 2018. Ms Lavina-Trenfield observed in her affidavit, sworn on the same day (at [26]-[30]):
2. after reviewing Mr Maiolo’s October 2014 affidavit, she inferred that, as the financial records annexed to that affidavit state that CFC is indebted to Action for over $1,000,000, CFC was not a secured creditor of Action as it was not a creditor of Action at all;
3. in additional support of that inference, CFC had failed to provide her or her solicitors with any evidence that:
	1. Action is indebted to CFC for any amount;
	2. CFC paid any amount to Bibby on behalf of Action (which would have potentially entitled CFC to rely on the right of subrogation); and
	3. the charge relied upon by CFC to appoint itself as controller secured any amount owed by Action to CFC;
4. she inferred that if any amounts were paid by CFC to Bibby or if any amounts were owned by Action to CFC, CFC would be able to provide her with bank statements or financial records in support of that position;
5. CFC had not provided her with any such documentation; and
6. in the circumstances, she formed the view that CFC was not validly appointed as the controller of Action.
7. Section 418A(1) requires the requisite doubt to be “on a specific ground”. Based on Ms Lavina-Trenfield’s evidence, the doubt was held on the ground that CFC was not a secured creditor of Action.
8. Mr Somerville contended that this ground is not a “ground” of the kind required by s 418A as a pre-condition an application for an order under s 418A(2), but did not elaborate the contention. Having regard to the fact that the Court’s power to make an order under s 418A(2) may be exercised on a ground specified in the application or some other ground, in my view, it is sufficient that the ground is sufficiently precise to answer the description of “specific ground” and, as a matter of fact, provided a foundation for the requisite doubt.
9. I am satisfied that the relevant ground, that CFC was not a secured creditor of Action, is sufficiently precise and was the actual ground upon which Ms Lavina-Trenfield’s doubt was based. Further, to the extent that it is necessary, I am satisfied that Ms Lavina-Trenfield’s doubt was genuine and was based on reasonable grounds, namely, a sworn statement by Mr Maiolo that was apparently inconsistent with the proposition that CFC was a creditor of Action and an insufficient response to the liquidators’ attempts to verify the true position.
10. Further, even if (as CFC contends) the plaintiffs should not have tendered the 14 October 2014 affidavit because that act was inconsistent with the implied undertaking given to the Local Court, I am satisfied that the insufficiency of CFC’s response to requests for information as to the debt owed by Action provided reasonable grounds for Ms Lavina-Trenfield’s doubt.

# Was CFC a creditor of Action?

1. CFC argued that its evidence establishes:
2. that the audited financials of CFC disclose a debt owed by Action to CFC as at 30 June 2012 which represents a reversal of the position prior to the alleged payment to Bibby (where CFC was indebted to Action) in the requisite amount;
3. the debt to Bibby was discharged on or about 5 June 2012;
4. the discharge of debt did not occur as a result of a payment made directly by Action to Bibby; and
5. the evidence of the assignment of the charge from Bibby to CFC is wholly consistent with the existence of the debt on account of the payment to Bibby by CFC.
6. On their face, the financial records disclose a debt owed by Action to CFC as at 30 June 2012, which is a reversal of the position as at 7 June 2012. CFC did not point to any items in the financial records in support of the position that the relationship between Action and CFC changed from creditor-debtor to debtor-creditor prior to the time of the alleged payment to Bibby. As far as I can tell, the general ledger report does not support a conclusion that CFC lent funds to Bibby for the payout, or effected the payout itself.
7. There is no satisfactory evidence as to who paid out Action’s debt to Bibby. I accept that the payment was not made by Action from funds held in a bank, based on Ms Lavina-Trenfield’s evidence that the payment is not recorded in Action’s bank statements. CFC did not suggest to the contrary.
8. Based on the bank cheques dated 4 and 5 June 2012 respectively, in favour of Bibby, I accept that Bibby was paid at least $137,301 to pay out Action’s debt. Based on the Bridges Lawyers’ 6 May 2013 letter, it is reasonably likely that an amount of $704,301.00 was paid to Bibby to pay out Action’s debt. However, the evidence does not reveal who procured the bank cheques or, as between those entities and Action or CFC, the terms upon which the cheques were provided to Bibby. There is no evidence beyond assertion about the payment of the balance of $567,000.
9. The circumstances of the payout are matters that should have been able to be proved readily with contemporaneous business records, even if it occurred by the use of bank cheques. It is notable that Mr Maiolo, who must have knowledge of the circumstances of the payment of that debt, chose not to give evidence (until the application for leave to re-open).
10. The deed of assignment of the charge and the notice of the assignment are consistent with an intention on the part of CFC to claim to be subrogated to Bibby’s rights. However, I do not accept that this evidence is “wholly consistent” with the existence of a debt owing by Action to CFC on account of the payment to Bibby by CFC for the following reasons:
11. the documents do not refer to any payment by CFC to Bibby; and
12. the deed of assignment contains an explicit statement that Bibby does not warrant the enforceability of the charge.
13. CFC put an alternate argument that Mr Lissa’s affidavit proved the advance of moneys by CFC to Action, following the assignment of the charge, which were “Secured Money” within the meaning of the charge. As I have noted above, the general ledger report shows a reduction in CFC’s loan balance in account “702 – AS&R” and an increase of $9,236.36 in account “714 – ASR Recoverable Costs”. Without more evidence, which should have been readily available, I am not satisfied that there was any advance of moneys by CFC to Action in the period from 5 June 2012 to 6 December 2012.
14. In the absence of more evidence, I am not satisfied that CFC is a creditor of Action for any amount. In particular, in the absence of more evidence, I am not satisfied that CFC paid any amount to Bibby on or about 5 June 2012 or that it paid any amount to Bibby in settlement of Action’s debt to Bibby.

# Did CFC enter into possession, or assume control, of Action’s property validly under the terms of the charge?

1. The plaintiffs initially contended that CFC’s entitlement to enter into possession of Action’s property depended upon the CFC’s payment of Action’s debt to Bibby, by which CFC could be subrogated to Bibby’s rights under the charge.
2. In its written outline of submissions, CFC accepted that its right “to appoint itself as controller of Action” was based upon Action’s indebtedness to CFC and the validity of the assignment: “In essence, if the assignment of the charge was valid and based upon a proper debt, the appointment is valid.”
3. Having failed to prove payment of Action’s debt, CFC had no right of subrogation either at general law or under s 3 of the LRMP Act.
4. However, a further question arose about the operation of the charge and the deed of assignment even if CFC failed to prove that it paid Action’s debt (whether as surety for debt or otherwise). Addressing that question, the plaintiffs contended that the purported assignment was ineffective because the rights under the charge had been “extinguished” by payment of monies owing under the charge in full prior to the purported assignment. Conversely, CFC argued that as a matter of construction of the charge, rights under the charge could be exercised regardless of whether Action was indebted to it.
5. This issue raised the following questions:
6. Was the “Secured Money” under the charge repaid?
7. If the “Secured Money” was repaid, did Bibby have rights under the charge to assign following repayment?
8. Was the charge validly assigned?
9. If the charge was validly assigned, could CFC exercise rights under it in an “Event of Default” in the circumstances of this case?
10. As to the first question, the answer is “yes”, based on the language of the deed of assignment, CFC did not dispute the fact of repayment.
11. As to the second question, the plaintiffs relied on the following propositions to contend that Bibby had no rights to assign once the “Secured Money” was repaid:
12. The essential nature of a charge is that specific property of the charger is appropriated to or made answerable for payment of a debt, and the chargee is given the right to resort to the payment for the purpose of having it realised and applied in or towards payment of debt: *Re Charge Card Services Ltd* [1987] 1 Ch 150 at 176.
13. As indicated by cll 2 and 4.1(a) of the charge, the charge was granted for the purpose of securing to Bibby the payment of the “Secured Money”.
14. Under the terms of the Charge, the charge may resort to the charged assets only for the purpose of satisfying payment of the “Secured Money”.
15. It was Bibby and Action’s intention, as evidenced by cl 4.6 of the charge, that upon payment of the whole of the “Secured Money”, Bibby would discharge the charge.
16. At the time of the purported assignment, the charge did not secure payment of any debt.
17. It was a term of the charge, either express or implied, that the powers set out in cl 10 of the charge could only be exercised if and to the extent that there was “Secured Money” due and payable.
18. I accept propositions (1), (2), (3) and (5).
19. As to (4), I accept that upon payment of the “Secured Money”, subject to any question of subrogation, Bibby came under an obligation to Action to discharge the charge in accordance with cl. 4.6.
20. I do not accept that there was an express term of the charge to the effect asserted in proposition (6). Nor do I accept that there was a relevant implied term.
21. It is not unknown for a chargee, having been paid the amount which it claims, to assign its security to the third parties that arranged for that payment: see, for example *Netet Pty Ltd v Mott* (1994)13 ACSR 586 at 589. Further, as CFC noted, s 3 of the LRMP Act provides for a surety who pays the debt of a third party to have assigned to it any security held by the creditor in respect of that debt. If CFC was a surety who had paid Action’s debt, it would not be surprising to seek the assignment contemplated by s 3 reflected in a deed of assignment.
22. However, in this case, the evidence does not support a conclusion that CFC paid part or all of Action’s debt to Bibby.
23. Once the “Secured Money” was repaid, Bibby had no rights under the charge to assign for the following reasons:
24. In *Re GM Industries* (1980) ACLC 40-665, Needham J held:

The purported creation of a charge over property to secure a debt where there is no debt and no contractual liability to raise one is, in my opinion, an act without legal effect. The very nature of a charge is a security for a debt or other legal or equitable obligation. One cannot have a charge in vacuo.

The charge cannot be supported … on the strength of the promise of the company that if Kangarilla made “further advances” they would be secured in the same fashion. There was no liability upon Kangarilla to make any advances and, therefore, there could be no valid creation of a charge to secure them.

…

The document being a nullity, it seems to me that it was not assignable.

1. By parity of reasoning, once the debt to Bibby was repaid, Bibby no longer had any property rights secured by the charge and consequently had no property rights to assign.
2. Thus, as Giles J noted in *PT Limited v Maradona Pty Ltd* (1992) 25 NSWLR 643 at 658, the assignment of the charge would be pointless unless a debt was also assigned.
3. This conclusion is consistent with the principle that an assignee of a mortgage, without the assignor’s consent, takes only on the same terms of the assignor: *Ashenhurst v Jones* (1745) 3 Atk 270;26 ER 958. Thus, “whatever the assignee pays, he can claim nothing under the assignment but what is actually due between the mortgagor and mortgagee”: *Chambers v Godwin* (1804) 32 ER 600 at 604. In this case, having been paid out, Bibby’s rights under cl 10 of the charge had been discharged by the performance of Action’s correlative obligation. All that remained was Bibby’s obligation to discharge the charge in accordance with cl 4.6.
4. The conclusion is also consistent with the statement of Dixon J in *Australian Guarantee Corporations Limited v Balding* [1930] HCA 10; (1930) 43 CLR 140 at 161 that a bare right of seizure of goods was not assignable without property in the goods. In that case the subject of the assignment was a hire purchase contract. See also *Chatterton v Maclean* [1951] 1 All ER 761 at 765-766.
5. It follows that there was no valid assignment of the charge.
6. In further support of this conclusion, I note that a mortgagee is not permitted to deal with secured property in such a way that, upon discharge of the debt, the property cannot be restored: *Tasker v Small* (1837) 40 ER 848 at 851; *Walker v Jones* (1865-69) LR 1 PC 50 at 62. In the latter case, the Privy Council noted at 61-62:

[61] It is also clear that every mortgagor has the right to have a re-conveyance of the mortgaged property upon payment of the money due upon the mortgage; and that every mortgagee is charged with the duty of making such re-conveyance upon such payment being made. This, indeed, is no more than the necessary result of the relative positions of the parties, the mortgage being only a security for the debt.

[62] … [I]t is not necessary for us to say that in no case can the mortgage debt be severed from the security for that debt; …

1. Again, by parity of reasoning, if the contractual rights under the deed of charge were property that was capable of assignment to CFC in the absence of any debt, the assignment would be inconsistent with Action’s right to procure a discharge of the charge from Bibby.
2. It is unnecessary to consider the position if the charge was validly assigned.

# Alternative relief under s 434A or 434B

1. Section 434A provides:

Where, on the application of a corporation, the Court is satisfied that a controller of property of the corporation has been guilty of misconduct in connection with performing or exercising any of the controller’s functions and powers, the Court may order that, on and after a specified day, the controller cease to act as receiver or give up possession or control, as the case requires, of property of the corporation.

1. Section 434B provides relevantly:

(1) The Court may order that, on and after a specified day, a controller of property of a corporation:

(a) cease to act as receiver, or give up possession or control, as the case requires, of property of the corporation; or

(b) act as receiver, or continue in possession or control, as the case requires, only of specified property of the corporation.

(2) However, the Court may only make an order under subsection (1) if satisfied that the objectives for which the controller was appointed, or entered into possession or took control of property of the corporation, as the case requires, have been achieved, so far as is reasonably practicable, except in relation to any property specified in the order under paragraph (1)(b).

(3) For the purposes of subsection (2), the Court must have regard to:

(a) the corporation's interests; and

(b) the interests of the secured party in relation to the security interest that the controller is enforcing; and

(c) the interests of the corporation's other creditors; and

(d) any other relevant matter.

(4) The Court may only make an order under subsection (1) on the application of a liquidator appointed for the purposes of winding up the corporation in insolvency.

1. As CFC was not entitled to enter into possession or assumption of control over Action’s property, it did not have any relevant functions or powers to exercise in connection with that property.
2. It follows that s 434A has no relevant application because the Court cannot be satisfied that CFC was guilty of misconduct in connection with the performance or exercise of the functions or powers of a controller.
3. Similarly, the power conferred by s 434B(1) is predicated upon a conclusion that CFC was entitled to enter into possession or assumption of control over Action’s property. This appears from s 434B(2) which conditions the Court’s power upon a finding of satisfaction that the objectives “for which the controller was appointed, or entered into possession or took control of property of [Action] have been achieved, so far as is reasonably practicable”.

# Conclusion

1. Having concluded that CFC did not enter into possession, or assume control, of Action’s property validly under the terms of the charge contrary to the position maintained by CFC, a declaration should be made to that effect. The grounds for the declaration are that CFC did not acquire any rights under the charge, either by a right of subrogation at general law or pursuant to s 3 of the LRMP Act, or pursuant to the deed of assignment.
2. Costs of the proceeding including reserved costs should follow the event.
3. I will grant leave to the plaintiffs to file short minutes of order seeking any necessary or appropriate consequential relief. The parties will be granted liberty to apply to have the matter re-listed for argument if any proposed consequential relief is not agreed.

# Interlocutory application to set aside Subpoena

1. Prior to the final hearing, by interlocutory process filed on 13 June 2018, CFC sought an order that a subpoena issued on 6 June 2018 to Sundip Ghedia, c/- Wyndham Lawyers, be set aside. After hearing argument, I set aside para 1 of the subpoena and otherwise dismissed the application. I stated that I would give reasons in my final judgment.
2. The subpoena sought production of the following documents:
3. A copy of the affidavit of Antonio Maiolo dated 24 October 2014, including Annexure A to that affidavit and Blake Shaw dated 24 October 2014 including its annexures or exhibits both filed on 24 October 2014 in *Technocraft Australia Pty Ltd v Antonio Maiolo,* Local Court of New south Wales Case Number 2013/267115.
4. A copy of the affidavit of Antonio Maiolo including any annexure or exhibit to that affidavit, filed on 24 October 2014 in *Antonia Maiolo v Technocraft Australia Pty Limited,* Federal Circuit Court, Case No. SYG2962/2014.
5. The affidavit of Mr Maiolo referred to in para 1 of the subpoena is a copy of Mr Maiolo’s October 2014 affidavit referred to earlier in these reasons as a matter relied upon by Ms Lavina-Trenfield in coming to the decision that CFC was not a creditor of Action.
6. CFC contended that the subpoena was liable to be set aside as an abuse of process because it sought copies of documents already within the possession of the plaintiffs, but which were said to have been obtained by a breach of the “Harman undertaking”, that is, the implied undertaking given to the Court not to use documents produced under compulsion except for the process of the proceeding for which they are prepared, except with the Court’s leave. CFC argued that the subpoena sought improperly to circumvent the operation of the undertaking.
7. CFC relied on the following facts:
8. The two affidavits referred to in para 1 of the subpoena were filed in support of Mr Maiolo’s application to set aside a default judgment entered against him by Technocraft in the Local Court.
9. The affidavits were never read in open court because the default judgment was set aside by consent in November 2014.
10. In reliance on the default judgment, Technocraft served a bankruptcy notice on Mr Maiolo. On 24 October 2014, Mr Maiolo filed an application in the Federal Circuit Court of Australia (“FCC”) seeking an order setting aside the bankruptcy notice. The application was supported by the affidavit referred to in para 2 of the subpoena.
11. The bankruptcy notice was set aside by consent and the affidavit referred to in para 2 of the subpoena was never read in open court.
12. The plaintiffs noted that on 24 October 2014, Registrar Ng made the following order in the FCC application:
13. Pursuant to subsection 41(6A) of the *Bankruptcy Act 1966* and rule 3.03 of the *Federal Circuit Court (Bankruptcy) Rules 2006,* on condition that Bankruptcy Notice No. BN 170223 of 25 July 2014 was served on 7 October 2014, the time for compliance by the Applicant with the requirements of the Bankruptcy Notice is extended up to and including 4 November 2014.
14. In *Hearne v Street* (2008) 235 CLR 125 at [96], Hayne, Heydon and Crennan JJ said:

Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an Anton Piller order, witness statements served pursuant to a judicial direction and affidavits. The appellants did not dispute the existence of this principle, and in particular did not dispute its potential application to the affidavit of Mrs Hesse and the witness statement of Dr Tonin.

(Citations omitted.)

1. The plaintiffs contended that the affidavits the subject of the subpoena were filed voluntarily and not under compulsion, so that the Harman undertaking did not arise. However, I accepted that, subject to the operation of r 14.11(1) of the *Federal Circuit Court Rules 2001* (Cth) (“FCC Rules”), discussed below, the affidavits attracted the implied undertaking to the Local Court and the FCC respectively, noting the doubt expressed by Brereton J concerning the case of affidavits in *Helicopter Aerial Surveys Pty Ltd v Garry Robertson* [2015] NSWSC 2104at [37]-[40].
2. I also accepted that, as third parties into whose hands the affidavits covered by the subpoena came, the plaintiffs were bound by the implied undertakings. Further, I accepted that on the available evidence, the solicitor for Technocraft remained bound by the undertaking because the affidavits had not been read in open court and the solicitor had not been formally released by either the Local Court or the FCC from the undertakings.
3. CFC contended that the proper course for the plaintiffs to adopt would be to apply to the Local Court or the Federal Circuit Court for a copy of the relevant affidavits, as provided for by r 8.10 of the *Local Court Rules 2009* (NSW) and r 2.08B of the FCC Rules.
4. The plaintiffs referred to r 14.11(1) of the FCC Rules, which provides:

An order or undertaking, whether express or implied, not to use a document for any purpose other than for the proceeding in which it is disclosed does not apply to the document after it has been read to or by the Court or referred to in open Court in such terms as to disclose its contents.

1. Further, r 3.03 of the *Federal Circuit Court (Bankruptcy) Rules 2016* (Cth)provides:

(1) An application for an extension of time, under subsection 41(6A) of the Bankruptcy Act, for compliance with a bankruptcy notice must be accompanied by an affidavit stating:

(a) the grounds in support of the application; and

(b) the date when the bankruptcy notice was served on the applicant.

Note: See also subsection 41(6C) of the Bankruptcy Act.

(2) The following must be attached to the affidavit:

(a) a copy of the bankruptcy notice;

(b) a copy of any application to set aside a judgment or order in relation to which the bankruptcy notice was issued and any material in support of that application.

(3) The application may be made in the absence of a party.

(4) The application need be heard in open court only if it is for an extension of time to a date after the first court date.

(5) If, on application, the Court extends the time for compliance with a bankruptcy notice, the following documents must be served on the respondent creditor within 3 days after the order is made:

(a) the application;

(b) the supporting affidavit;

(c) the order.

1. I inferred that Mr Maiolo’s affidavit filed in the FCC was read and taken into account by the Registrar in making the 24 October 2014 order. Accordingly, I concluded that, by r 14.11(1), the implied undertaking did not apply to that affidavit.
2. As a result, I declined to set aside para 2 of the subpoena. I set aside para 1 of the subpoena, accepting that it sought improperly to circumvent the operation of the implied undertaking.

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| I certify that the preceding one hundred and fifty-six (156) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson. |

Associate:

Dated: 13 March 2019