

Decision impact statement

In the matter of Western Port Holdings Pty Ltd (receivers and managers appointed) (in liq)

Court citation(s):	[2021] NSWSC 232
Venue:	Supreme Court of NSW
Venue reference no:	2018/115544
Judge name(s):	Rees J
Judgment date:	12 March 2021
Appeals on foot:	No
Decision outcome:	Unfavourable to the Commissioner

Impacted advice



This decision has no impact on any related advice or guidance.

Précis

This case concerns the recoverability of payments as unfair preferences pursuant to Part 5.7B of the *Corporations Act 2001* (Corporations Act) in the winding up of Western Port Holdings Pty Ltd (the Company).

Brief summary of facts

In the course of its operations, the Company borrowed money:

- from, and extended loans to, related companies (SHA (Vic) Pty Ltd (SHA) and Services and Maintenance Group Pty Ltd (SMG)) and family members (Messrs O'Hare and Duthie) on an unsecured basis, and
- from Hermes Capital on a secured basis.

On 13 April 2015, the Company went into voluntary administration and a Deed of Company Arrangement (DOCA) was executed on 22 May 2015. On 24 May 2017, creditors resolved to terminate the DOCA and appointed the deed administrators as liquidators.

Between 18 August 2015 and 1 March 2017, the Commissioner received payments totalling \$2,692,025.06 on account of the taxation debts of the Company. Eleven of these payments (totalling \$1,193,624.00) were made to the Commissioner directly from third parties (third-party payments).

Issue decided by the Court

Were the third-party payments 'receiv[ed] *from the company*' within the meaning of section 588FA(1)(b) of the Corporations Act?

Third-party payments

In determining whether the third-party payments resulted in the Commissioner 'receiving *from the company*' more than he would receive if he proved in a winding up, Rees J identified the following principles enunciated by the Victorian Court of Appeal in *Cant v Mad Brothers Earthmoving Pty Ltd* [2020] VSCA 198 (*Mad Brothers*) as applicable¹:

- (c) The words 'from the company' in s 588FA(1)(b) have the effect of retaining the requirement under the previous law that the preference be received from the company's own money, meaning money or assets to which the company is entitled.
- (d) It is necessary, in order for a preference to be 'from the company' that the receipt of it by the creditor has the effect of diminishing the assets of the company available to creditors.
- (e) On the other hand, a payment by a third party which does not have the effect of diminishing the assets of the company available to creditors is not a payment received 'from the company' and is therefore not an unfair preference.

Rees J determined that she was required to follow *Mad Brothers*, being a considered judgment of an intermediate appellate court, albeit expressing some 'disquiet' by the reasoning of the Victorian Court of Appeal.²

In upholding the liquidators' claim to all eleven third-party payments, her Honour determined that each of the payments resulted in the Commissioner 'receiving *from the company*' an amount within the meaning of section 588FA(1)(b) of the Corporations Act.

Specifically, Rees J found that:

- Certain payments made to the Commissioner by Mr O'Hare, SHA and SMG were made in reduction of debts owed by them to the Company. These payments resulted in a diminution of the Company's assets because the amount recoverable from those third parties were assets of the Company that were no longer available for distribution to creditors in a winding up (Loan Repayment Transactions).³
- Certain payments made to the Commissioner by Mr Duthie, SHA and SMG by way of loans by them to the Company were also 'receiv[ed] *from the company*'.⁴ The Court considered that such payments were '*... no different from that which would apply if Western Port Holdings had borrowed the money on overdraft from its bank and paid the ATO those funds.*' The Court referred to the decision of the Full Federal Court in *Commissioner of Taxation v Kassem and Secatore* [2012] FCAFC 124 (*Kassem*) in concluding that payments made from overdrafts were 'receiv[ed] *from the company*' within the meaning of section 588FA(1)(b) of the Corporations Act⁵ (Loan Advance Transactions).

¹ At [7], referring to *Mad Brothers* at [120].

² At [38–39].

³ At [170–171] and [175].

⁴ At [174–175].

⁵ At [174], referring to *Kassem* at [62].

- Payments made to the Commissioner by Hermes Capital were made by way of drawing on a facility secured against the Company's book debts and thus resulted in a diminution of assets available to unsecured creditors (Hermes Payments).⁶

ATO view of decision

Third-party payments

The Commissioner accepts that the Loan Repayment Transactions and the Hermes Payments had the effect of diminishing the assets of the Company available to unsecured creditors in a winding up. On the facts found by Rees J, upholding the liquidators' claim to those third-party payments was consistent with the principles in *Mad Brothers*.

In the Commissioner's view, although correctly identifying the applicable principles set out by the Victorian Court of Appeal in *Mad Brothers* and concluding that judgment was a binding authority, Rees J erred in her application of those principles to the Loan Advance Transactions sought to be recovered by the liquidators.

The Commissioner respectfully considers that Rees J erred in finding that the Loan Advance Transactions resulted in a diminution of the Company's assets available to unsecured creditors in the winding up. Contrary to the Court's findings, the Full Federal Court's decision in *Kassem* does not provide a basis for concluding that such payments are recoverable as unfair preferences. As Rees J identified, *Kassem* did not determine, but expressly left open, the question of whether a diminution of assets was necessary to satisfy section 588FA of the Corporations Act.⁷ Conversely, the issue was specifically addressed and determined by the Victorian Court of Appeal in *Mad Brothers*. Further, in *Kassem*, the Full Federal Court was not required to consider the requirements of when a payment is 'receiv[ed] from the company' within the meaning of section 588FA(1)(b) of the Corporations Act.

The Commissioner understands the law in this area is as expressed by the Victorian Court of Appeal in *Mad Brothers* – that payments to an unsecured creditor from unsecured overdrafts and other unsecured borrowings merely effect a rearrangement amongst unsecured creditors.⁸ Where borrowings are unsecured, the assets of a company available for distribution amongst creditors in a winding up are not diminished. As concluded by the Victorian Court of Appeal in *Mad Brothers*, such payments do not meet the description of being 'receiv[ed] from the company' within the meaning of section 588FA(1)(b) of the Corporations Act and accordingly are not voidable as unfair preferences.

On 6 April 2021, the Commissioner filed a Notice of Intention to Appeal the decision of the Court to the NSW Court of Appeal.

On 23 June 2021, at the request of the parties, the Court made notations that the parties had reached an agreement that the Commissioner was not required to pay the liquidators' claim to recover the Loan Advance Transactions. This development made any appeal by the Commissioner from the decision of Rees J unnecessary.

⁶ At [178–179].

⁷ At [24], and *Kassem* at [60].

⁸ *Mad Brothers* at [112].

Implications for impacted advice or guidance

When responding to unfair preference claims involving payments from third parties (including those received from an unsecured overdraft), the Commissioner will rely on the decision in *Mad Brothers* as binding authority in this area of the law. As such, the Commissioner will require liquidators to prove that any payments made by third parties resulted in a diminution of the assets of a company which would have been available to unsecured creditors in a winding up before accepting that the payment was 'receiv[ed] from the company' within the meaning of section 588FA(1)(b) of the Corporations Act.

Legislative references

Corporations Act 2001

Part 5.7B

588FA

588FA(1)(b)

Case references

Cant v Mad Brothers Earthmoving Pty Ltd [2020] VSCA 198

Commissioner of Taxation v Kassem and Secatore [2012] FCAFC 124; (2012) 205 FCR 156

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