



## Recovering and Determining Unfair Preference Payments

---

In the current economic climate, we may see a greater number of preference claims being made with insolvency cases. Accordingly, it is important that a party, which may have reasonable grounds for suspecting the solvency of a company, is aware that any transaction entered into between itself and a company may be subject to scrutiny by a liquidator if the company becomes wound up soon after.

### Case Study

In September 2005, Mr Peter Peters (**'Peters'**) purchased a motor vehicle from the Scholz Motor Group Pty Ltd (**'Scholz'**) for \$165,000. That amount was deposited into Scholz's overdraft account. Peters then applied for finance for the motor vehicle for \$165,000, which was also deposited into Scholz's overdraft account on Peters' behalf.

Scholz provided a cheque of \$165,000 to Peters to refund the initial sum that Peters had paid Scholz, but that cheque dishonoured. Scholz was to provide a further cheque to Scholz the following week, but that cheque was also dishonoured. Scholz and Peters then entered into a payment plan, and in partial satisfaction of the debt, Scholz presented Peters with a cheque in the amount of \$10,000 and delivered two motor vehicles. When no further payments were forthcoming, Peters proceeded to sell the vehicles for \$50,000 and \$35,000 to a car dealer.

On 26 January 2006, Scholz went into administration and the creditors of the company resolved to wind up Scholz. The liquidator of Scholz applied for an Order stating that the payment of \$85,000 received from the sale of the two motor vehicles constituted an unfair preference. Peters filed a counterclaim claiming that Scholz had held the \$165,000 in its overdraft account on trust for Peters, and therefore Peters was entitled to priority over other creditors of Scholz in relation to the \$70,000 owing to him.

### The Result

The Court concluded that the primary judge erred that the money was held on trust for Peters. Scholz did not hold property which could give rise to a trust as the intention of Scholz was to have the payment applied for its own benefit and not to keep the monies separate as trust property. The payment of monies by the finance company into Scholz' overdraft account had the consequence of the funds continuing to exist as such funds could not be traced through an overdrawn bank account. Therefore, any consequent proprietary claim against Scholz was lost, leaving Peters only with a personal claim at common law for the debt.

Section 588FA of the *Corporations Act 2001* (Cth) provides that a transaction is an unfair preference given by a company to a creditor if, and only if, the creditor receives more than what it would from the company if the transaction was set aside and the creditor were to lodge a proof of debt in a winding up of the company. Peters submitted that, based on the 70 cents in the dollar that was estimated to be available for distributions to creditors in the liquidations, the comparison which should be made was the benefit Peters would have received by way of the transaction (\$95,000) and the amount which would have been received had the transaction been set aside, which would have amounted to approximately \$115,500. The Court rejected Peters' submissions and held that the Court should not depart from the interpretation set out in *Walsh v Natra Pty Ltd* (2000) 1 VR 523 where it was held the transaction was to be viewed as a full payment of a portion of a debt.

### **Statutory Defences under s588FG(2) of the *Corporations Act 2001* (Cth)**

Peters argued that he had no reasonable grounds for suspecting Scholz was insolvent and no reasonable person standing in his position would have suspected insolvency either. However, this argument was rejected by the Court.

The Court stated the following reasons would have indicated to a reasonable person about Scholz's solvency position:

- A reasonable person would have wondered why Scholz was having difficulty in refunding the sum of \$165,000 if it was not experiencing liquidity issues.
- A reasonable person's doubts would have been increased at the time when Peters collected the first cheque he was advised not to bank it until the following Monday.
- A reasonable person's doubts about the insolvency would have increased by the failure to pay the sum of \$165,000.

The ability of a liquidator to set aside a transaction is wide ranging under the *Corporations Act 2001* (Cth). This case emphasises that the rights of a liquidator to recover proceeds from an unfair transaction and recover the proceeds for the benefit of the body of creditors of a company. It confirms the rationale behind the *Corporations Act 2001* (Cth) to ensure the rights of an unsecured creditor are not prejudiced by the disposition of assets by a company in the period leading up to it being wound up.

### **Practical Tips**

- Be aware of the solvency position of the businesses you do business with.
- If you suspect a solvency issue, be aware that liquidators will be scrutinising your transactions with the company.

---

For assistance with all your legal needs, email us at [info@msslawyers.com.au](mailto:info@msslawyers.com.au) or visit our website [www.msslawyers.com.au](http://www.msslawyers.com.au). Alternatively, contact our professional team at our Gold Coast or Brisbane office.

#### **Gold Coast Office**

9 Ouyan Street  
Bundall QLD 4217  
PO Box 9073 GCMC QLD 9726  
T +61 7 5597 8888  
F +61 7 5597 8899

#### **Brisbane Office**

Level 10, 410 Queen Street  
Brisbane QLD 4000  
PO Box 3246 Brisbane QLD 4001  
T +61 7 3229 6099  
F +61 7 3226 9001