



New South Wales
Supreme Court

CITATION : **Sutherland & Anor as joint liquidators of Australian Coal Technology v Hanson Construction Materials Pty Ltd [2009] NSWSC 232**

HEARING DATE(S) : 03/03/09

JUDGMENT DATE : 3 April 2009

JURISDICTION : Equity Division
Corporations List

JUDGMENT OF : Barrett J

DECISION : Separate question answered

CATCHWORDS : CORPORATIONS – winding up – preference recovery proceedings – separate question as to solvency during relevant period – definition of solvency considered – matters pertaining to solvency examined – deed of novation – indemnity clause – whether an on demand debt is a contingent or current liability

LEGISLATION CITED : Corporations Act 2001 (Cth), Part 5.3A, ss 9, 95A, 439A, 588FA, 588FC, 588FF
Evidence Act 1995, s 79

CATEGORY : Principal judgment

CASES CITED : Bank of Australasia v Hall [1907] HCA 78; (1907) 4 CLR 1514
Bell Group Ltd (in liq) v Westpac Banking Corp (No 9) [2008] WASC 239
Box Valley Pty Ltd v Kidd [2006] NSWCA 26; (2006) 24 ACLR 471
Expile Pty Ltd v Jabb's Excavations Pty Ltd [2003] NSWCA 163; (2003) 45 ACSR 711
Hall v Poolman [2007] NSWSC 1330; (2007) 65 ACSR 123
Hymix Concrete Pty Ltd v Garrity (1977) 13 ALR 321; 2 ACLR 559
Keith Smith East West Transport Pty Ltd v Australian

Taxation Office [2002] NSWCA 264; (2002) 42 ACSR 501
Lewis v Doran [2004] NSWSC 608; (2004) 50 ACSR 175
Lewis (as Liquidator of Doran Constructions Pty Ltd) v
Doran [2005] NSWCA 243; (2005) 54 ACSR 410
Manpac Industries Pty Ltd v Ceccattini [2002] NSWSC 330;
(2002) 20 ACLC 1304
New Cap Reinsurance Corp Ltd (in liq) v Grant [2008]
NSWSC 1015; (2008) 68 ACSR 176
Noxequin Pty Ltd v Deputy Commissioner of Taxation [2007]
NSWSC 87
Sandell v Porter (1966) 115 CLR 666
Southern Cross Interiors Pty Ltd (in liq) v Deputy
Commissioner of Taxation [2001] NSWSC 621; (2001) 53
NSWLR 213

PARTIES :

Roderick Mackay Sutherland and Sule Arnautovic in their
capacity as joint liquidators of Australian Coal Technology
Pty Limited - First Plaintiff
Australian Coal Technology Pty Limited - Second Plaintiff
Hanson Construction Materials Pty Limited - First Defendant
H & M Engineering & Construction Pty Limited - Second
Defendant
Triangle Cables (Aust) Pty Limited - Third Defendant
FLSMIDTH Abon Pty Limited - Fourth Defendant
Michilis (Queensland) Pty Limited - Fifth Defendant
Enerka Apex Belting Pty Limited - Sixth Defendant
RD Services (Glenden) Pty Limited - Seventh Defendant
Team Welding Pty Limited - Eighth Defendant

FILE NUMBER(S) :

SC 6183/07

COUNSEL :

Mr F Gleeson SC/Mr S M Golledge - Plaintiffs
Mr M B Holmes - First Defendant
Mr M A Izzo - Fourth Defendant

SOLICITORS :

Middletons - Plaintiffs
Patane Lawyers - First Defendant
Mallesons Stephen Jaques - Fourth Defendant

**IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
CORPORATIONS LIST**

BARRETT J

FRIDAY, 3 APRIL 2009

6183/07 ROBERT MACKAY SUTHERLAND & ANOR AS JOINT LIQUIDATORS OF AUSTRALIAN COAL TECHNOLOGY & ANOR v HANSON CONSTRUCTION MATERIALS PTY LIMITED & ORS

JUDGMENT

1 In these proceedings, the liquidators of Australian Coal Technology (“ACT”) seek orders under s 588FF of the *Corporations Act* 2001 (Cth) for the payment of money to ACT by each of the several defendants. It is alleged that each defendant was party to a transaction with ACT which involved receipt by the defendant in question of an “unfair preference” within the meaning of s 588FA and was an “insolvent transaction” within s 588FC.

2 On the 29 September 2008, the Court ordered that the following question be determined as a separate question:

“Whether the Second Plaintiff was insolvent at any time between 30 November 2005 and 3 March 2006 and, if so, for what period or periods”.

3 On the 3 March 2009 I heard submissions on the separate question. Submissions were made on behalf of the liquidators only. The third, sixth, seventh and eighth defendants did not appear at the hearing and the proceedings are no longer on foot in relation to the second and fifth defendants. The first defendant (Hanson Construction Materials Pty Ltd) (“Hanson”) and the fourth defendant (FLSMIDTH Abon Pty Ltd) appeared solely in order to put the liquidators to proof.

4 ACT was incorporated on 6 April 1994. It was principally engaged in the business of engineering design, construction and testing of coal preparation plants. At the relevant time, ACT had undertaken three significant projects. First, ACT entered into a contract on 21 January 2005 with Newlands Coal Pty Ltd as agent for Mount Isa Mines Limited to supply and install a coal preparation plant at the Newlands coal mine (“Newlands Project”). Second, ACT entered into a contract with Millennium Coal Technology Pty Ltd dated 28 January 2005 for the construction of another coal preparation plant (“Millennium Project”). Third, ACT entered into a contract with Collinsville Coal Company Pty Ltd on the 20 July 2005 in relation to the supply and installation of a coal preparation plant at the Collinsville coal mine (“Collinsville Project”).

5 On 3 March 2006, the first plaintiffs were appointed as voluntary administrators of ACT pursuant to Part 5.3A of the *Corporations Act*. The period to which the separate question relates is accordingly the period of six months ending on the relation back day within the meaning of s 9 of the *Corporations Act*. On 26 May 2006, the first plaintiffs became liquidators of ACT by resolution of the creditors of ACT at the meeting held pursuant to s 439A of the Act.

6 In relation to the separate question, the plaintiff relies on two affidavits. The first is the affidavit of one of the liquidators, Mr Arnautovic. The second affidavit is that of an expert, Mr Olde, who prepared a report dated 18 July 2008 in relation to the solvency of ACT. I am satisfied that Mr Olde has specialised knowledge based on his training, study and experience which forms the basis of his opinion evidence and that it is accordingly admissible under s 79 of the *Evidence Act* 1995.

7 Any examination of the separate question must begin with the provisions of s 95A of the

Corporations Act:

- “(1) A person is solvent if, and only if, the person is able to pay all the person’s debts, as and when they become due and payable.
(2) A person who is not solvent is insolvent.”

8 It has been authoritatively determined that s 95A calls attention principally to the cash flow test of insolvency with subsidiary relevance afforded to the balance sheet test. That this is the correct approach was recognised by the Court of Appeal in *Keith Smith East West Transport Pty Ltd v Australian Taxation Office* [2002] NSWCA 264; (2002) 42 ACSR 501; see also *Expile Pty Ltd v Jabb’s Excavations Pty Ltd* [2003] NSWCA 163; (2003) 45 ACSR 711; *Lewis (as Liquidator of Doran Constructions Pty Ltd) v Doran* [2005] NSWCA 243; (2005) 54 ACSR 410; *Box Valley Pty Ltd v Kidd* [2006] NSWCA 26; (2006) 24 ACLR 471.

9 These cases emphasise that solvency is to be determined primarily according to the company’s cash flows: see *Manpac Industries Pty Ltd v Ceccattini* [2002] NSWSC 330; (2002) 20 ACLC 1304; *Noxequin Pty Ltd v Deputy Commissioner of Taxation* [2007] NSWSC 87. It is important to note, however, that the state of the balance sheet, although not the primary test, remains relevant to the separate question: *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* [2008] WASC 239 at [9.2.1] per Owen J.

10 Section 95A requires a decision whether the company is suffering from a temporary lack of liquidity (*Bank of Australasia v Hall* [1907] HCA 78; (1907) 4 CLR 1514; *Sandell v Porter* (1966) 115 CLR 666 at 670) or an “endemic shortage of working capital”: *Hymix Concrete Pty Ltd v Garrity* (1977) 13 ALR 321 at 328; 2 ACLR 559. In *Hall v Poolman* [2007] NSWSC 1330; (2007) 65 ACSR 123 at [266], Palmer J referred to this distinction and observed:

“The first is an embarrassment, the second is a disaster. It is easy enough to tell the difference in hindsight, when the company has either weathered the storm or foundered with all hands; sometimes it is not so easy when the company is still contending the waves.”

11 The emphasis must be upon the extent of cash and other liquid assets compared with the quantum of debts due and payable and to become due and payable in the immediate future. Insufficiency of cash or liquid resources to pay those debts is indicative of insolvency. The insufficiency becomes determinative if it is shown that it is more than a temporary lack of liquidity. In essence, there is a question whether the inability to pay is purely temporary.

12 In *Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation* [2001] NSWSC 621; (2001) 53 NSWLR 213; Palmer J, at 224-225, summarised the law as to the determination of solvency for the purposes of s 95A by setting out the following principles:

- (i) whether or not a company is insolvent for the purposes of the *Corporations Act* (Cth), ss 95A, 459B, 588FC or 588G(1)(b), is a question of fact to be ascertained from a consideration of the company’s financial position taken as a whole;
- (ii) in considering the company’s financial position as a whole, the Court must have regard to commercial realities. Commercial realities will be relevant in considering what resources are available to the company

to meet its liabilities as they fall due, whether resources other than cash are realisable by sale or borrowing upon security, and when such realisations are achievable;

(iii) in assessing whether a company's position as a whole reveals surmountable temporary illiquidity or insurmountable endemic illiquidity resulting in insolvency, it is proper to have regard to the commercial reality that, in normal circumstances, creditors will not always insist on payment strictly in accordance with their terms of trade but that does not result in the company thereby having a cash or credit resource which can be taken into account in determining solvency;

(iv) the commercial reality that creditors will normally allow some latitude in time for payment of their debts does not, in itself, warrant a conclusion that the debts are not payable at the times contractually stipulated and have become debts payable only upon demand;

(v) in assessing solvency, the court acts upon the basis that a contract debt is payable at the time stipulated for payment in the contract unless there is evidence, proving to the court's satisfaction, that:

- there has been an express or implied agreement between the company and the creditor for an extension of the time stipulated for payment; or
- there is a course of conduct between the company and the creditor sufficient to give rise to an estoppel preventing the creditor from relying upon the stipulated time for payment; or
- there has been a well established and recognised course of conduct in the industry in which the company operates, or as between the company and its creditors as a body, whereby debts are payable at a time other than that stipulated in the creditors' terms of trade or are payable only on demand:

(vi) it is for the party asserting that a company's contract debts are not payable at the times contractually stipulated to make good that assertion by satisfactory evidence." (References omitted)

13 Finally, any inquiry into whether insolvency existed at a particular time is generally assisted by searching for what Palmer J, in *Lewis v Doran* [2004] NSWSC 608; (2004) 50 ACSR 175 at 191, described as the "usual indicia of insolvency":

- 1) a history of dishonoured cheques;
- 2) suppliers insisting on COD terms;
- 3) the issue of post-dated or "rounded sum" cheques;
- 4) special arrangements with creditors;

- 5) inability to produce timely, audited accounts;
- 6) unpaid group tax, payroll tax, workers compensation premiums or superannuation contributions;
- 7) demands from bankers to reduce overdraft and other evidence of deteriorating relations with bankers;
- 8) receipt of letters of demand, statutory demands and court processes for debt.

14 I turn to the facts, beginning with Mr Olde's analysis of the all-important matter of ACT's cash position.

15 The approach adopted by Mr Olde was to analyse the company's financial statements which were produced on a monthly basis from an MYOB accounting system. The documents produced included a profit and loss statement, a balance sheet for each month end, a bank reconciliation report and an accounts payable and accounts receivable summary. In addition, he examined the available books and records of ACT.

16 Mr Olde found it necessary to make certain adjustments to the MYOB records of the company. He notes that these adjustments were necessary to ensure that the MYOB records correctly recorded the financial position and performance of ACT during the relevant period. In his opinion, it was necessary to make three adjustments to reconcile the company's Westpac bank account with the MYOB accounts.

17 First, the month end balance sheets were adjusted to reflect deposits actually made into the bank account before the end of the month, which were not, however, recorded in the monthly MYOB report. Similarly, payments made by the company to creditors were included, as they were also not recorded in the monthly MYOB accounts.

18 Second, the monthly statements were adjusted to reflect the fact that ACT's audited financial statements as at 30 June 2005 included a significant amount of unearned income. In those circumstances, ACT should have included a current liability in its balance sheet and an expense in its profit and loss statement equal to the amount of the unearned income. This means that the accounts were showing profitability in the projects at earlier stages and then larger losses towards the end. Mr Olde made adjustments to match income and work across each period.

19 Third, the month end balance sheets were adjusted to reflect what, in Mr Olde's view, was an incorrect recording as a current asset of a debt claimed to be owed by Schenck Australia Ltd which was, throughout the relevant period, the subject of dispute and legal action. This inaccuracy meant that the company's current assets were overstated by the amount of that debt, namely \$1,185,968.

20 Ultimately, these adjustments do not affect the outcome of the case, as the plaintiffs contend that ACT's insolvency is established on either the adjusted figures or the original unadjusted figures. It does appear, however, that the adjustments made by Mr Olde were necessary in order to provide a more reliable picture of the true financial position of the company.

21 Having made the adjustments, Mr Olde proceeded to review the financial statements, both on an adjusted and unadjusted basis, focusing on ACT's liquidity position. He prepared a table in which he outlined the difference between the amount of the funds in ACT's bank account and the amount of its debts outstanding beyond 30 days (Cash less aged creditors beyond 30 days). The table also shows for the relevant period the difference between the amount of the ACT's cash at bank plus all outstanding receivables and the total amount of creditors

(Cash/receivables less all creditors), Net Profit/Loss and Accumulated Profit/Loss. The amounts are as follows:

BASED ON THE UNADJUSTED MYOB RECORDS

ITEM	31-Oct-2005	30-Nov-2005	31-Dec-2005	31-Jan-2006	28-Feb-2006
Cash less aged creditors beyond 30 days	- \$ 4,747,112	- \$12,183,245	- \$ 8,692,301	- \$17,048,376	- \$24,096,612
Cash/receivables less all creditors	- \$16,443,475	- \$18,995,721	- \$24,261,916	- \$34,386,893	- \$23,461,556
Net Profit/ Loss	- \$18,910,988	- \$ 2,988,648	- \$ 6,987,307	- \$10,278,393	\$ 8,950,375
Accumulated Loss	- \$14,914,616	- \$17,903,264	- \$24,890,572	- \$35,168,965	- \$26,218,589

BASED ON THE ADJUSTED MYOB RECORDS

ITEM	31-Oct-2005	30-Nov-2005	31-Dec-2005	31-Jan-2006	28-Feb-2006
Cash less aged creditors beyond 30 days	\$ 1,660,625	- \$12,120,347	- \$ 9,027,155	- \$17,048,376	- \$24,096,612
Cash/receivables less all creditors	- \$17,629,444	- \$20,181,689	- \$25,447,886	- \$35,572,863	- \$24,647,536
Net Profit/Loss	- \$16,419,957	\$ 2,618,724	\$ 6,439,680	- \$ 1,916,310	- \$10,391,890
Accumulated Loss	- \$22,980,308	- \$20,361,584	- \$13,921,903	- \$15,838,213	- \$26,230,103

22 This table shows that ACT did not have enough cash available on a month-by-month basis to cover its accounts due and payable from at least 30 November 2005 to 28 February 2006. The significant deficiency of working capital appears both on the adjusted and unadjusted MYOB accounts. On the unadjusted figures, as at 30 November 2005, the “cash less aged creditors beyond 30 days” was negative \$12 million and the “cash and all receivables compared to total creditors” was negative \$18 million. The position did not materially improve over the relevant period. By the end of February, the deficiency in working capital amounted to \$23 million. On the adjusted figures, the figures are slightly higher for “Cash/receivables less all creditors”: at 30 November 2005, that item is negative \$20 million and at the end of the period, 28 February 2006, it is negative \$24 million. At no stage did ACT have sufficient liquid or near liquid assets from which to meet outstanding debts as they fell due.

23 The MYOB records strongly support a finding of insolvency throughout the period in question. However, counsel for the fourth defendant raised an issue concerning the reliability of these records. The issue arose out of a deed of novation entered into in relation to the Millennium Project. The project became the subject of a novation agreement in January 2006, as amended later in that month and on two occasions in February 2006. There was also a subcontractor deed of novation.

24 Under the last-mentioned document, in particular clauses 3.1 and 3.2, Millennium CHPP Pty Ltd (“CHPP”) became liable for ACT’s obligations arising after the “Effective Date” of the novation, which was ultimately 14 February 2006. Under clause 3.3, ACT’s pre-existing liabilities were not released. CHHP, the substituting party, was not liable for any obligations that arose under the principal agreement under the subcontract before the effective date. There is evidence, however, that Millennium did in fact make payments for pre-existing liabilities on ACT’s behalf. In paragraphs 31 and 32 of Mr Arnautovic’s affidavit it is noted

that CHPP made certain payments to various creditors of ACT from approximately late January 2006 for debts owing by ACT to creditors prior to the effective date.

25 It was the practice of CHPP to notify Mr Paul Siderovski, ACT's external accountant, about payments made by CHPP to ACT's creditors for debts incurred pre-existing the effective date. The email correspondence exhibited in Mr Olde's report does not make it altogether clear, however, whether the payments were actually made. At least \$6.5 million was paid, however it is unclear whether the remainder of the payments were actually made.

26 A number of payments were made by CHPP for liabilities incurred by ACT prior to the effective date which cannot be disputed. One example can be found in relation to Plummers Industries. The court was shown a remittance advice concerning a payment made by CHPP, on behalf of ACT, to Plummers Industries on 1 February 2006. The payment was made to satisfy six invoices totalling \$699,960.03. The debt was satisfied. But in the payables reconciliation summary for February 2006 there is a figure of \$688,960.03 shown as owing, so that no reduction in debt is recognised. A similar situation can be seen in relation to a debt of \$719,785 owed to Zenith Civil. It was included in the list of debts paid by CHPP however was not removed from the payables reconciliation summary.

27 Counsel for the fourth defendant submitted that, having regard to items of this kind, debts of ACT were cleared by payments made by CHPP at least to the extent of \$6.5 million and that it was possible on the evidence that the payments actually made by CHPP, on behalf of ACT, could amount to as much as \$18.9 million. Based on this, it was put to Mr Olde that his figure of \$47 million as the total owed by ACT to creditors in the payables reconciliation summary of February 2006 was inaccurate. Mr Olde's response was that whether or not there was an inaccuracy would be dependent on the company's obligation to CHPP since the relevant debts could be eliminated only if there was no corresponding obligation of ACT to pay CHPP. If there was such an obligation, a debt would still exist.

28 To ascertain whether there was an obligation for ACT to make CHPP whole, it is necessary to look at the deed of novation. Clause 5 of the deed, headed "Indemnity by Retiring Party", says:

"The Retiring party unconditionally and irrevocably indemnifies the Substitute Party on demand against any claim, loss, liability or expense which the Substitute Party pays, or is liable for, arising directly or indirectly from an act of the Retiring Party or an omission by the Retiring Party in respect of the Principal Agreement, which occurred before the Effective Date."

29 It was submitted on behalf of the plaintiffs that, to the extent that CHPP did, in fact, discharge liabilities which pre-dated the effective date, it became entitled to reimbursement for those claims from ACT in force of this indemnity clause. I accept that submission. That is the effect of the clause.

30 Counsel for the fourth defendant, in cross-examination of Mr Olde, next raised an issue as to whether the liability under the indemnity clause was a current liability or a contingent liability. The proposition was advanced that the indemnity clause concerned a claim that CHPP may or may not make. In other words, the debt did not automatically and immediately arise but rather was contingent on CHPP deciding to pursue the claim. The contingency related to the phrase "on demand" in the relevant clause. Mr Olde was asked whether or not

any demand had been made by CHPP in respect of the sums paid to the creditors of ACT, arising before February 2006. Mr Olde could not identify any demand.

31 The fact that no demand was made does not mean that the obligation owed to CHPP by ACT was a contingent liability, as distinct from an immediate liability. The case is really one of an on demand debt, such as a debt on overdraft account. It should not be regarded as a contingent liability. It is a current liability and therefore is correctly included in Mr Olde's payables reconciliation summary.

32 It was appropriate for the debts in question to be recognised in the payables reconciliation summary even though, in an immediate sense, some of them had been paid by CHPP.

33 Mr Olde's figure (based on the unadjusted MYOB records) of a working capital deficiency of \$23,461,556 as at 28 February 2006 is correct. The submission made by the fourth defendant that the working capital deficiency may only amount to \$5.5 million, as a result of the payments made by CHPP, cannot be accepted.

34 It is, however, strictly unnecessary to determine whether the obligations accruing to ACT in consequence of payments made by CHPP should be characterised as a contingent or current liability owed by ACT. It was held in *New Cap Reinsurance Corp Ltd (in liq) v Grant* [2008] NSWSC 1015; (2008) 68 ACSR 176 that contingent and prospective debts are to be taken into account when assessing solvency and insolvency, at least where they are of an immediately pressing nature.

35 It was, in any event, accepted by counsel for the fourth defendant that the matter of possible re-classification of these items would not turn insolvency into solvency.

36 Mr Olde's opinion is that ACT became insolvent no later than 30 September 2005 and remained insolvent from that date. He stated in cross-examination that this opinion would not be affected even if the deficiency were only \$5.5 million. He suggested that the other indicia of insolvency outlined in his report would still exist and would strongly support his conclusion that the company was insolvent. The other reasons for his opinion of insolvency were an excess of liabilities over assets (balance sheet insolvency), continued loss making activity, outstanding creditors of more than 60 days, the holding of cheques, suppliers placing the company on COD, payments to creditors of rounded sums not reconcilable to specific invoices, unsecured creditors being paid outside trading terms, creditors pressing for payment, the decreasing of receivables and increasing of creditors, insufficient resources to make payments, the difficulty ACT had procuring supplies from suppliers, an inability to generate additional funds and an inability to borrow or raise further equity capital.

37 I should now examine these other circumstances which Mr Olde says support a conclusion of insolvency.

38 From September onwards there is evidence that ACT began to suffer significant trading losses on the Millennium Project and the Newlands Project. For the period July 2005 to March 2006 the combined losses on these two projects was approximately \$32 million. In respect of the Millennium Project it became necessary to enter into the deed of novation because ACT could not continue to perform its obligations under the contract. The Newlands and Collinsville Projects were loss-making and were terminated in March 2006. The evidence does not identify any source from which ACT could meet those losses.

39 ACT's share capital was only \$1,200. It had no bank overdraft facility and could not obtain any other relevant source of loan finance. With loss-making contracts and a severe shortage of working capital there is no reason to think that ACT would have been able to borrow money

from any financial institution. The audited financial report as at 30 June 2005 shows no substantial tangible assets which could be sold or borrowed against to raise funds.

40 The only cash resources ACT had were its receivables. The majority of those, however, were in the 0 to 30 day category and thus were unlikely to be able to be factored in so as to improve cash flow. As ongoing trade was unprofitable, there was no reasonable prospect of future profits being earned to recoup the losses accruing on those existing projects. The table at paragraph [21] above shows that on the unadjusted figures ACT had an accumulated loss of \$26,218,589 as at 28 February 2006 and \$26,230,103 on the adjusted figures as at the same time.

41 ACT's relationships with its creditors are exposed throughout Mr Olde's report. According to section 2 of the "Aged Creditors and Debtors Summary", ACT first experienced a significant quantity of creditors greater than 60 days on 30 September 2005 (\$65,218). Thereafter, the amounts owing to creditors greater than 60 days progressively and steadily increased each month to reach \$12.9 million on 28 February 2006. There is evidence in Mr Arnautovic's affidavit about trading terms with the various creditors. He notes that, based on his review of the records of ACT, there is nothing to suggest that the trading terms did not apply between ACT and the relevant creditors throughout the period October to February 2006. He then observes that all creditors included in the review appear to have been paid outside trading terms during that period. He provides the following summary:

End of Month	Average days paid late for sample creditors
Oct-2005	16
Nov-2005	22
Dec-2005	32
Jan-2006	33

42 In relation to trade creditors, there is also evidence of promises being made and broken by ACT. An email from H&M Engineering & Construction Pty Ltd refers to ACT's commitment to pay and the subsequent restrictions placed on ACT in terms of supplies as a result of the failure to honour this commitment. H&M on another occasion was also paid a rounded sum figure of \$200,000, which is not reconcilable to any particular invoice. Indeed, in an email dated 23 February 2006, subsequent to the payment, H&M noted the fact that ACT still owes approximately \$2,102,000 for the December and January period and requested payment of the invoices "ASAP".

43 There are a number of other examples of difficulties in relation to trade creditors. Mr Olde notes that, on 4 November 2005, Enerka placed ACT on COD for future deliveries. Similarly

there are a number of other suppliers insisting on COD terms, accounts being blocked and supplies being restricted. A number of creditors issued letters of demand or otherwise pressed for payment. The evidence highlights the objections made by creditors to ACT's chronic and continuing delinquency in the matter of due payment.

44 In relation to receivables and creditors, there was a marked deterioration of ACT's financial position throughout the relevant period. Between 31 August 2005 and 28 February 2008, the combined value of receivables and unsecured creditors fell from positive \$7.98 million to negative \$24.1 million on an unadjusted basis; and positive \$6.79 million to negative \$25.3 million on an adjusted basis. The company had no available cash to clear this deficiency and no viable prospects for obtaining such financial resources. As mentioned, there was no overdraft facility and no significant uncollected receivables apart from the contested Schenck receivable.

45 Although there is no evidence of post-dated cheques, there is ample evidence of cheques being held back. To establish whether cheques were held back, Mr Olde analysed the dates the cheques were entered into the MYOB system and the dates the cheques were debited to ACT's bank account. On average, the difference in days was 7.6 in August, 15.3 in September, 1.3 in October, 7.1 in November, 7.9 in December, 8.6 in January and 5.0 in February. Mr Olde says that the average period (9 days) is greater than he would expect to see in the accounts of a solvent company trading in the ordinary course and are consistent with the deliberate holding back of cheques.

46 There is thus evidence in this case of a number of the "indicia of insolvency" referred to in *Lewis v Doran* (above). In particular:

- 1) ACT had increasing difficulties in procuring supplies. There is evidence of suppliers having insisted on COD terms. One example is to Enerka.
- 2) Although no evidence of post-dated cheques was adduced, there was evidence of holding back cheques. This practice involves the same strategy and has the same effect. There was also evidence on rounded sum cheques (indicating a likelihood of part-payment only). The payment of \$200,000 to H&M when it was owed a further \$2,102,000 is but one example.
- 3) The deteriorating relationship between ACT and its trade creditors is made clear by the expert's report. The evidence shows unsecured creditors being paid outside trading terms. There were numerous letters of demand and instances where creditors were pressing for payment.
- 4) Throughout the relevant period there was a continuing increase in liabilities in conjunction with a decrease in receivables. In addition ACT's three contracts were loss making and the company was unable to generate additional funds through either loan finance or equity.

47 In the light of the whole of the matters examined by him, Mr Olde reached a conclusion expressed as follows in his report:

"In my opinion and for the reasons set out in this report:

- the Company became insolvent no later than 30 September 2005; and

· the Company was insolvent (and as such was experiencing more than a temporary lack of liquidity) throughout the period 30 September 2005 to 3 March 2006

Without detracting from those opinions, I note that there is greater certainty about the Company being insolvent on and after 30 November 2005 than before that date. This is because the Indicators of Insolvency for 30 September 2005 and 31 October 2005 are not uniformly consistent”.

48 In answering the separate question, the court only needs to have regard to the period 30 November 2005 to 3 March 2006. For this period, the indicia are uniformly consistent and conclusive. I am satisfied that, at each and every point during that period, cash and other liquid assets of ACT were insufficient to meet debts due and payable and to become due and payable in the immediate future. The insufficiency was endemic, it was not a temporary or transient problem but a deep-seated and continuing disability. ACT did not have any profitable contracts, it was continuing to make losses. There were no apparent sources of long term external finance. ACT did not have an overdraft. I am therefore of the view that Mr Olde’s opinion is well founded and supported by the evidence, so far as the period covered by the separate question is concerned.

49 My review and assessment of that evidence, as well as the analysis, discussion and conclusion in Mr Olde’s report, lead me to answer the separate question as follows:

“Yes, ACT was insolvent at all times during the period commencing 30 November 2005 and ending 3 March 2006”.

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Last Modified: 06/04/2009