4th Annual Insolvency Practice Symposium
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Chief Justice Paul de Jersey AC*

Following the modern trend, I attempted to find something amusing about insolvency to 'break the ice'. Perhaps not surprisingly, the lighter side of liquidation is yet to be explored by the world's comedians. Was it Mel Brooks who said there is humour in everything? Even he would struggle here. The lighter side seems entirely absent. In the era when it was the Supreme Court which made sequestration orders, we sometimes sought to dull the pain for agitated newly declared bankrupts with the words: 'It'll be a comfort to you to have an expert manage your affairs'. They seemed rarely convinced. Well, for want of a light side, I must be serious, and I felt it might assist if I provided this morning a brief review of some very recent decisions on voidable transactions, first looking at unfair preferences, beginning with some regrettably dry cases on aspects of procedure – notably, compliance with that perennial bug-bear, time limits.

Voidable Transactions

Unfair Preferences

The New South Wales Court of Appeal in ***BP Australia Ltd v Brown***,[1] considered the proper construction of the time limit imposed upon liquidators seeking orders with respect to voidable transactions.[2] The liquidators of two companies were seeking orders under s 588FF(1) against BP Australia Ltd to recover the amounts involved in certain voidable transactions.

Section 588FF provides:

> (3) An application under subsection (1) may only be made:
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> (a) within 3 years after the relation-back day; or
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> (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator within those three years.[3]

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* I am indebted to my associate, Miss Clare Eardley, for her substantial work in the preparation of this paper.

[1] [2003] NSWCA 216 (Unreported, Spigelman CJ, Mason P and Handley JA, 8 August 2003).

[2] *BP Australia Ltd v Brown* [2003] NSWCA 216 (Unreported, Spigelman CJ, Mason P and Handley JA, 8 August 2003) [2] (Spigelman CJ).

[3] *Corporations Act 2001* (Cth).

The primary judge had granted the liquidators an extension upon an application brought outside the three year period, relying on s 1322(4)(d).[4]

Section 1322(4)(d) provides the court may make:

> an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) …

BP Australia appealed against the decision of the trial judge, and reasonably queried why the specific requirement of s 588FF(3) should not prevail.

The Court of Appeal agreed, saying s 588FF(3) is 'intended to cover the field of extensions of time with respect to s 588FF(1) applications, to the exclusion of the general power in s 1322(4)(d)'.[5] Therefore, s 588FF(3) has the effect of requiring those who wish to make an application, 'to determine that they do wish to do so within the three year period and to seek a determinate extension of the period'[6] within that time frame.

But how specific need an applicant liquidator be? Must he be able to identify the particular transaction, or will the court grant a more general authority?

Spigelman CJ said 'it is not difficult to envisage a circumstance in which a liquidator is still ascertaining the identity of the recipients of the benefits under possible voidable transactions and cannot give the court an indication of the creditors to be targeted'.[7] In those cases, he said, the power of the courts is broad enough to allow an order granting an extension of time in general terms.[8]

[4] *Corporations Act 2001* (Cth); *BP Australia Ltd v Brown* [2003] NSWCA 216 (Unreported, Spigelman CJ, Mason P and Handley JA, 8 August 2003) [11] (Spigelman CJ).
[5] *BP Australia Ltd v Brown* [2003] NSWCA 216 (Unreported, Spigelman CJ, Mason P and Handley JA, 8 August 2003) [129] (Spigelman CJ).
[6] Ibid [118].
[7] Ibid [170].
[8] Ibid.

His Honour agreed with the primary judge that there is no reason why applications cannot be described by category, as opposed to specific terms, provided the category description is clear.[9]

What criteria apply? The court's discretion under (3)(b) is statutorily unfettered. 'Other than the stipulation that an application for such an extension must be made within the original period of 3 years, nothing in the section specifies any criterion to be taken into account when exercising the discretion, or any other matter which governs the exercise of the discretion'.[10] While the applicant has 'the positive burden of demonstrating that the justice of the case requires [an] extension',[11] a factor for the court to consider when deciding whether or not to allow an application for extension of time is 'what was fair and just in all of the circumstances'.[12] While liquidators may feel this generally unhelpful, the variety of possible considerations means this is a situation better left to courts, rather than dependent on the legislature's capacity to catalogue all, or most, possibly relevant circumstances.

The Queensland Court of Appeal considered these issues in ***Greig & Duff as liquidators of Australian Building Industries Pty Ltd (in liquidation) v Australian Building Industries Pty Ltd (in liquidation) & Anor***.[13]

- 'The liquidators of Australian Building Industries Pty Ltd ('ABI') sought to avoid several payments made to Stramit Corporation Pty Ltd in the six months before the company's liquidation.
- Despite making several demands, the liquidators did not commence any court proceedings under s 588FF(1) within the three-year time limit.
- The liquidators sought, and were granted, an extension of time to bring applications under s 588FF(1).
- However, this application was not served on any creditor – the liquidators sought a blanket extension order, and as a result, the order was later set aside as it

[9] Ibid [168].
[10] Ibid [182].
[11] Ibid [183].
[12] Ibid [187].
[13] [2003] QCA 298 (Unreported, Williams and Jerrard JJA and Fryberg J, 18 July 2003).

applied to Stramit. The liquidators subsequently applied under s 588FF(1) to join Stramit in proceedings to claw back funds'.[14]

As with *BP Australia v Brown,* Williams JA agreed with the primary judge that there was no power to make any order extending any time limit under s 588FF(3) in reliance on s 1322(4)(d).[15] The Court of Appeal then considered the question whether liquidators must nominate specific creditors or transactions. Williams JA held, Jerrard JA agreeing, that at least as a general rule, the court has no power to grant a blanket extension of time pursuant to s 588FF(3) on an ex parte application[16] - as must be the procedural situation where there is no identified creditor who can therefore in the ordinary sense be served. Williams JA observed 'any liquidator doing his or her job competently would at least be able to say towards the end of the three year limitation period what transactions might be challenged'.[17]

Jerrard JA suggested it was incongruous that s 588FF(3) be construed in broad terms. Liquidators should be required to nominate specific transactions, because the orders the court is empowered to make 'are ones directed to particular persons requiring specified acts, or orders releasing specified debts or security, or making specific declarations concerning or varying specified agreements'.[18] The only circumstances abrogating the general rule would be where the liquidator could satisfy the court that the date of their appointment or the state of affairs of the company, rendered the liquidator unable to delineate the nature of a possible application or the identity of potential creditors, but where doubtful transactions plainly arose.[19] Relevant creditors should also, he said, be given notice of any applications for orders to extend time,[20] and that is obviously consistent with the general approach of courts, especially the 'natural justice' stipulation.

[14] Allens Arthur Robinson, 'No blanket extensions of time permitted to recover unfair preferences' *Annual Review of Insolvency and Restructuring Law 2003* 199.
[15] *Greig & Duff as liquidators of Australian Building Industries Pty Ltd (in liquidation) v Australian Building Industries Pty Ltd (in liquidation) & Anor* [2003] QCA 298 (Unreported, Williams and Jerrard JJA and Fryberg J, 18 July 2003) [92] (Williams JA).
[16] Ibid [51] (Williams JA); [111] (Jerrard JA).
[17] Ibid [45] (Williams JA).
[18] Ibid [111] (Jerrard JA).
[19] Ibid [112].
[20] Ibid [33-36] (Williams JA).

Spigelman CJ comments on *Greig* at the end of his reasons in *BP Australia v Brown. Greig* was handed down after, apparently, the balance of his judgment was written. He responds to Williams JA's rhetorical statement, that a liquidator should be able to identify the relevant creditors and transactions within the three year period, with the riposte, 'not necessarily'.[21] However, he then goes on to acknowledge that Williams JA prefaced his conclusion that the court has no power to grant a blanket extension of time with the proviso, 'as a general rule'. This led his Honour to conclude that Williams JA's opinion, and his own, 'may differ more in form than substance'.[22]

Both *BP Australia v Brown* and *Greig v Australian Building Industries* were considered in March by Barrett J in ***McGrath & Ors re HIH Insurance Ltd (in liquidation)***,[23] a case which illustrated the desirability, in the public interest, of some flexibility in the courts' approaches to these matters. And so, it appears, this gargantuan insolvency has not only contributed to revision of the law of negligence.

The HIH liquidators sought an extension of time pursuant to s 588FF(1) for three reasons:

- 'first, the size and complexity of the business and affairs of the group;
- second, the need for continual liaison with regulatory and investigatory bodies; and
- third, the difficulty in obtaining access to relevant information and documents'.[24]

Barrett J acknowledged several aspects of the evidence pointing to the mammoth task the HIH liquidators face, including the circumstances that investigations will continue for several years; there being gaps in the corporate records, and a 'general paucity' of financial records; the current inability to access records held by ASIC; and the indexing of some 100,000 boxes of documents.[25]

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[21] *BP Australia Ltd v Brown* [2003] NSWCA 216 (Unreported, Spigelman CJ, Mason P and Handley JA, 8 August 2003) [201] (Spigelman CJ); *McGrath & Ors re HIH Insurance Ltd (in liquidation)* [2004] NSWSC 165 (Unreported, Barrett J in Equity, 12 March 2004) [16].
[22] *BP Australia Ltd v Brown* [2003] NSWCA 216 (Unreported, Spigelman CJ, Mason P and Handley JA, 8 August 2003) [202] (Spigelman CJ).
[23] [2004] NSWSC 165, New South Wales Supreme Court per Barrett J in Equity, 12 March 2004.
[24] *McGrath & Ors re HIH Insurance Ltd (in liquidation)* [2004] NSWSC 165 (Unreported, Barrett J in Equity, 12 March 2004) [19].
[25] Ibid [15].

Barrett J held that those circumstances combined to work a 'clear and cogent exception to the expectation expressed by Williams JA in *Greig*'.[26] The circumstances described by Jerrard JA which would abrogate the general rule were present, and therefore, a general order of the type described by Spigelman CJ was granted.[27]

In summary, liquidators will not gain an extension of the time limit prescribed by s 588FF(3)(b) by recourse to s 1322(4)(d). The need for liquidators to identify, within the three year period, whether an extension is necessary, is therefore essential. But where, for cogent reasons, particular identification is not possible, more general orders extending time may be granted.

Let me turn now to the merits of the unfair preference application. ***Sellers & Anor v Offset Alpine Printing Pty Ltd; Sellers & Anor v Trigra Pty Ltd (in liquidation)***,[28] helpfully illustrates how courts properly determine defences to unfair preference claims.[29]

The liquidators of Eric Clarke & Associates Pty Ltd ('the Company') sought orders to avoid seven payments made to the two respondents, Offset Alpine and Trigra, arguing the payments constituted unfair preferences within the meaning of s 588FA.[30] The payments were made within the six month period ending on the relation back day[31] and, on appeal, it was accepted there was no doubt the Company was insolvent at all relevant times:[32]

> 'In consequence, by reason of the convoluted provisions of Division 2, the relevant transactions in each case were 'unfair preferences' within the meaning of s 588FA, thus 'insolvent transactions' within the meaning of s 588FC and thereby

[26] Ibid [17].
[27] Ibid.
[28] [2003] VSCA 37 (Unreported, Winneke P and Ormiston and Charles JJA, 17 April 2003).
[29] Allens Arthur Robinson, 'Knowledge of debtor's financial troubles not necessarily grounds for suspecting insolvency' *Annual Review of Insolvency and Restructuring Law 2003* 187.
[30] *Corporations Act 2001* (Cth); *Sellers & Anor v Offset Alpine Printing Pty Ltd; Sellers & Anor v Trigra Pty Ltd (in liquidation)* [2003] VSCA 37 (Unreported, Winneke P and Ormiston and Charles JJA, 17 April 2003) [2] (Ormiston JA).
[31] *Corporations Act 2001* (Cth) s 588FE(2).
[32] *Sellers & Anor v Trigra Pty Ltd (in liquidation); Sellers & Anor v Trigra Pty Ltd (in liquidation)* [2003] VSCA 37 (Unreported, Winneke P and Ormiston and Charles JJA, 17 April 2003) [2] (Ormiston JA).

'voidable transactions' within the meaning of s 588FE, so that each was, pursuant to s 588FF, subject to the making of orders having the effect of setting it aside'.[33]

The order to set aside is made unless the respondent is able to establish a defence under s 588FG. The respondent must prove:

- 'that each payment was received in good faith;
- they had no reasonable grounds for suspecting that the Company was insolvent or would become insolvent; and
- a reasonable person in the respondent's circumstances would have had no such grounds for suspecting insolvency'.[34]

The Court of Appeal noted that both Trigra and Offset Alpine had similar experiences in collecting debts from the Company. It was not uncommon for the Company's accounts to be outstanding for long periods of time. The Company had a policy of not paying for printing until they had received payment for catalogues and brochures.[35]

The apellant's argued that these following matters meant the primary judge erred in concluding that Trigra had no reasonable grounds for suspecting that the Company was unable to pay its debts as they fell due:[36]

- the poor payment history of the Company;
- the age of the debts;
- the earlier assurances that the Company could pay;
- the statements that the Company was having difficulty in making payment and the forceful demands of Trigra's solicitor for a guarantee and the provision of a statement of solvency.[37]

The Court of Appeal noted that the test is based on the actual circumstances known to those who benefit by the 'insolvent transactions,' and that they must be examined in relation to the question: would a person in those circumstances, and with that particular knowledge, have had no reasonable belief as to solvency?[38]

[33] Ibid.
[34] Ibid.
[35] Ibid [7] .
[36] Ibid [10].
[37] Ibid.
[38] Ibid [11].

The Court of Appeal took the view the primary judge was entitled to conclude that the circumstances of the payments to both Trigra and Offset Alpine did not reveal any 'significant difference from the history of slow payment which had been typical of the Company's conduct over several years'. Both parties had previously tolerated this conduct without mishap. Therefore, the primary judge reasonably concluded there were no reasonable grounds to suspect the Company was insolvent. In short, a history of slow payment, but eventual payment, may favour sustaining an impugned transaction. More may be required for avoidance, and that was not established here.

Uncommercial Transactions

Now let me pass to the similar, though different, subject of 'uncommercial transactions. In ***Skouloudis Group Pty Ltd (in liquidation) v Planet Enterprizes Pty Ltd,***[39] the liquidator of the Skouloudis Group sought a declaration that the transfer of their newspaper business to Planet Enterprizes was an insolvent transaction within s 588FC of the *Corporations Act 2001* (Cth), because an uncommercial transaction within s 588FB(1).[40]

It was common ground, before both the primary judge and the Court of Appeal, that the Skouloudis Group was insolvent at the time of the transaction. The sole issue was whether the transaction was uncommercial. At first instance the trial judge held the liquidator had not discharged the onus of proof.[41]

Mr and Mrs Skouloudis gave evidence that the sale was an informal transaction, not directly evidenced in writing. The primary judge found that the Skouloudis Group agreed to sell the newspaper business in consideration of the purchaser's taking over its liabilities, including the payment of staff entitlements.[42]

But significantly, the liquidator failed to provide acceptable evidence of the worth of the business and his assertion it was worth more than was paid was discounted.

[39] [2003] NSWCA 31 (Unreported, Handley, Giles and Hodgson JJA, 17 February 2003).
[40] *Skouloudis Group Pty Ltd (in liquidation) v Planet Enterprizes Pty Ltd* [2003] NSWCA 31 (Unreported, Handley, Giles and Hodgson JJA, 17 February 2003) [1] (Handley JA).
[41] Ibid [2].
[42] Ibid [11-12].

Further, the liquidator failed to establish evidence of creditors and their debts, the debts of the printing business and in particular, proofs of debts had not been called for.[43]

The Court of Appeal held there was 'no evidence from which the Court can make a finding as to the value of the benefits to the company of entering into the transaction for the purposes of s 588FB(1)(a) because the total purchase price is not known and was not proved'. Further, the Court of Appeal was also 'unable to determine what the detriment to the [Skouloudis Group] was within s 588FB because the value of the business was not established'.[44] This decision provides a reminder of the importance – one would have thought obvious - of presenting comprehensive proof of all relevant circumstances said to substantiate claims of voidable transactions.

Then there is ***Onefone Australia Pty Ltd v One.Tel Ltd (in liquidation),***[45] concerning an application for the appointment of a special liquidator in respect of one particular aspect of the winding up of One.Tel Ltd.[46] Prior to the appointment of administrators, One.Tel had determined to raise additional capital through a renounceable rights issue, under which capital of $132 million was to be sought from shareholders by the issue of new shares.[47]

A directors meeting on 29 May 2001, apparently accepted that a rights issue raising $132 million would not be sufficient for the company. A resolution was put and carried, that the rights issue be cancelled.[48]

Then at the annual general meeting of creditors on 4 September 2003, a resolution was put as follows:

> 'That the Liquidators of One.Tel Limited approach the Court for the appointment of a Special Purpose Liquidator to investigate the cancellation of the Renounceable

[43] Ibid [19].
[44] Ibid [21].
[45] [2003] NSWSC 1228 (Unreported, Windeyer J in Equity, 19 December 2003).
[46] *OneFone Australia Pty Ltd v One.Tel Ltd (in liquidation)* [2003] NSWSC 1228 (Unreported, Windeyer J in Equity, 19 December 2003) [1].
[47] Ibid [3].
[48] Ibid [5-6].

> Rights Issue by the directors of One.Tel Limited and to make recommendations to the creditors as to whether any rights of action exist and whether any action should be commenced against any party(s) in relation to that rights issue or the cancellation of it, or such orders as the Court may think appropriate'.[49]

This resolution was carried by the creditors as to number, but not as to value. The chairman did not exercise the general proxies in his favour. Neither did he utilise his casting vote. He declared the resolution lost.[50]

The plaintiffs commenced proceedings on 15 October 2003, seeking an order that a Special Purpose Liquidator be appointed to the First Defendant to investigate the cancellation of the Renounceable Rights Issue.[51] The more important argument on the application was concerned whether the cancellation of the rights issue could amount to an uncommercial transaction within s 588FB(1).[52] Windeyer J said 'it is not the function of the court on this application to decide the question, but nevertheless I consider it is the function of the court to decide whether there is any possible claim'.[53]

- '… the argument in this case would have to be that the decision to cancel the renounceable rights issue was a transaction of the company which brought about the insolvency of the company because if the company was insolvent at the time of the cancellation, then quite clearly it would have been impossible to proceed with the issue.
- If the cancellation were an insolvent transaction then for the purposes of s 588FE it would be voidable.
- … counsel for the plaintiffs argued that the company may have some rights, through its liquidator, to an order under s 588FF(1)(c) requiring that the proposed underwriters 'pay to the company an amount that in the court's opinion represents some or all of the benefits' the proposed underwriters have received through the cancellation of the rights issue'.[54]

Although Windeyer J said it was not desirable he express a view, he did say the argument was not automatically doomed to fail, as the evidence appeared to indicate

[49] Ibid [8].
[50] Ibid.
[51] Ibid [9].
[52] Ibid [15].
[53] Ibid [16].
[54] Ibid [17].

that 'the creditors who voted for the resolution which was lost suspect that the cancellation of the rights issue was brought about for the benefit of the underwriters, not for the benefit of the company'.[55]

He concluded there was a basis for ordering further investigation by a special purpose liquidator as to whether there was an uncommercial transaction. The investigation was to be done on the basis of an assumption that the company became insolvent as a result of the cancellation.[56]

The present regime contemplates active scrutiny by the courts of the workings of companies, no doubt a scrutiny the legislature feels necessary, or at least desirable, in the context of published corporate dealings – and more relevantly misdealings, brought to light in recent years.

Let me offer another single-judge decision. Young CJ in Equity, described the circumstances of ***Woh Step Back Pty Ltd v Kings Developments (NSW) Pty Ltd***[57]as 'rather bizarre'.[58] It was a purchaser's suit for specific performance, where the main defence was that the transaction was an uncommercial transaction within the meaning of s 588FB. The defendant company was in financial difficulty, having it was said been defrauded by its shareholder, a 'con man'.[59] In financial distress, the defendant company formed a relationship with an accountant. The accountant, as well as becoming the accountant to the defendant company, lent it a great deal of money through a corporate vehicle.[60]

The position of the defendant company was precarious by 22 April 2003. The company simply had no money. The defendant and the plaintiff, being the accountant, entered into contracts to sell two lots of land to the plaintiff's company, of which the accountant was the sole shareholder and director.[61] Young CJ identified

[55] Ibid.
[56] Ibid [19].
[57] [2003] NSWSC 1249 (Unreported, Young CJ in Equity, 19 December 2003).
[58] Ibid [1-2].
[59] Ibid [2].
[60] Ibid [3].
[61] Ibid [5].

three aspects of the land transactions which may have given rise to 'uncommercial transactions'.

If the court is satisfied that a transaction is voidable under s 588FE, s 588FF gives the court power to make one of the orders set out in ss (a) to (j) of s 588FF(1), including the option to make an order to vary an agreement, or to declare the agreement void.[62]

Section 588FB provides:

> (1) A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
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> (a) the benefits (if any) to the company of entering into the transaction; and
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> (b) the detriment to the company of entering into the transaction; and
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> (c) the respective benefits to other parties to the transaction of entering into it; and
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> (d) any other relevant matter.

The key test whether a transaction may be considered uncommercial, is 'whether the undervalue, if it is a case of undervalue … shows that there is a bargain of such magnitude that it cannot be explained by normal commercial practice'.[63]

Young CJ concluded, first, that the price fell within the ambit of an uncommercial transaction: there was an undervalue of $75,000. There being an 'uncommercial transaction,' Young CJ ordered the purchase price be increased by $75,000.[64]

He held the two other aspects did not render it an uncommercial transaction. The circumstances surrounding the problems with the deposit were described by Young CJ as 'murky'. The deposit was not paid in cash but advanced to the company, and settlement of the transaction could take place within six weeks. His Honour decided against making an order that the deposit be paid in the meantime, especially

[62] Ibid [12].
[63] Ibid [13]; *Demondrille Nominees Pty Ltd v Shirlaw* (1997) 25 ACSR 535, 548; *McDonald v Hanselmann* (1998) 28 ACSR 49, 53; *Lewis v Cook* (2000) ACLC 490.
[64] *Woh Step Back Pty Ltd v Kings Developments (NSW) Pty Ltd* [2003] NSWSC 1249 (Unreported, Young CJ in Equity, 19 December 2003) [17].

because there may be a decree of specific performance, 'which will be as good a guarantee that the contract will be performed as any deposit'.[65]

The other matter concerned a variation to give a twelve month settlement period. Counsel for the defendant argued that 'one looks at the contract, when considering whether it is uncommercial, as it was made, or made and varied, not as how a party later may concede it is to be performed'.[66] However, as the contract had already been found to be uncommercial and the variation made, the Judge determined that argument lost significance.[67]

Repayment of Directors' Bonuses

***Corporations Act 2001* (Cth) s 588FDA(1)**

Now may I turn to a matter which has consumed the recent interest, not only of the commercial community, but the public generally, and that is the sometimes extraordinary financial treatment of those who control corporations. I deal briefly with a new provision of the *Corporations Act*, s 588FDA(1).

As you are no doubt aware, an additional category of voidable transaction has been inserted into the *Corporations Act*. Section 588FDA, which commenced on 11 April 2003 provides that a transaction of a company is an unreasonable director-related transaction if, and only if:

- it is a payment, disposition of property, or issue of securities, or the incurring by the company of an obligation (including a contingent obligation) to make such a payment, disposition or issue (s 588FDA(1)(a)); and
- the payment is made to a director of the company, a close associate of a director of the company, or a person on behalf of, or for the benefit of, a director or a close associate (s 588FDA(1)(b)); and
- it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction having regard to:
    - the benefits (if any) to the company of entering into the transaction; and

[65] Ibid [18].
[66] Ibid [19].
[67] Ibid.

- the detriment to the company of entering into the transaction; and the respective benefits to other parties to the transaction of entering into it; and
- the respective benefits to the other parties to the transaction of entering into it; and
- any other relevant matter (s 588FDA(1)(c)).[68]

Concerns have been raised about several aspects of the provision, including that it applies only to directors and not to senior executives,[69] and applies only to companies in liquidation and not in other kinds of administration.[70] Of particular interest is that the test of unreasonableness in s 588FDA is the same as the test of unreasonableness for uncommercial transactions in s 588FB.[71] The Senate Economics Legislation Committee Report justified the use of the test because it 'brings with it an established body of case law and common use by insolvency practitioners'.[72]

But, despite that sizeable body of case law, problems have arisen with the test of uncommerciality in relation to 'the value to be attributed to the benefits and detriments to the company,' as '[v]aluation is often a very inexact science, and requires the exercise of a considerable amount of judgment'.[73] It has been suggested that an appropriate improvement to the provisions for uncommercial transactions and the repayment of directors' bonuses is for Australian courts to 'accept a range of values within which a transaction cannot be challenged'.[74] I am drawing on an interesting analysis by Edmund Finnane and Daren Armstrong in an article headed 'Legislative Review: Repayment of Directors' Bonuses', published in the Commercial Law Quarterly.

[68] Edmund Finnane and Daren Armstrong, 'Legislative Review: Repayment of Directors' Bonuses' (2003) March-May *Commercial Law Quarterly* 26-27.
[69] Ibid 27.
[70] Mark Standen and Gabia Roberts, 'Repaying inappropriate directors' bonuses: the new rules' (2003) <http://www.minterellison.com/ajpe/connect/web/navigation/MintersLaw/Publications> at 29 April 2004.
[71] Finnane and Armstrong, above n 68, 28.
[72] Ibid.
[73] Ibid.
[74] Ibid.

It has been noted that it is not clear why the test for unreasonableness should be the same for both director related transactions and uncommercial transactions.[75] Two aspects of the provisions are quite dissimilar. First, s 588FDA transactions will be voidable without proof of insolvency whereas uncommercial transactions require proof of insolvency. Second, the defence of good faith is not available to director related transactions as it is with uncommercial transactions.[76] Section 588FDA is yet to be considered by the courts and it will be interesting to see how these sorts of issues are approached.

Costs and Secured Creditors

Finally, I turn away from voidable transactions to two recent decisions of the Queensland Court of Appeal: the first deals with the potential liability in costs of liquidators in litigation for insolvent companies, and the second, secured creditors surrendering their rights.

First, liquidators' personal liability in costs – always a most diverting issue. In ***Kimtran Pty Limited & Anor v Downie & Anor***,[77] the Court of Appeal set aside orders by the District Court requiring liquidators 'to personally pay the costs of an application that they caused a company (of which they were the liquidators) to make before the Queensland Building Tribunal'.[78]

The principal question was whether or not the Queensland Building Tribunal had jurisdiction to award costs against a non-party, like a liquidator.[79] The Tribunal is a statutory body, equipped statutorily with the power to award costs.[80]

Gaudron J discussed the approach which should be adopted in the interpretation of the power to award costs in *Knight v FP Special Assets Ltd*:[81]

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[75] Ibid.
[76] Ibid.
[77] [2003] QCA 424 (Unreported, McMurdo P and Dutney and Philippides JJ, 26 September 2003).
[78] Allens Arthur Robinson, 'Costs orders against liquidators reversed' *Annual Review of Insolvency and Restructuring Law 2003* 147.
[79] *Kimtran Pty Limited & Anor v Downie & Anor* [2003] QCA 424 (Unreported, McMurdo P and Dutney and Philippides JJ, 26 September 2003) [15] (Dutney J).
[80] Ibid [16].

> 'Powers conferred on a court are powers which must be exercised judicially … [t]he necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse'.

State tribunals are of course different from their Commonwealth counterparts – because of Chapter 3 of the Constitution. Many State tribunals closely resemble courts.

The Court of Appeal held unsurprisingly that as the Queensland Building Tribunal 'falls into that category of a body which is required to act judicially it follows that a broad interpretation should be given to the power to award costs'.[82] So there was power to order costs against a 'non-party'.

The liquidators were however successful because, although the Queensland Building Tribunal was held to have the discretion to award costs, the Court of Appeal found that costs should not have been ordered, because:

- 'no impropriety or misconduct was found against the liquidators;
- it was significant that the case before the tribunal was dismissed for failure to provide security for costs and without any determination on its merits, particularly where security had been sought and obtained at an early stage before incurring significant costs;
- the successful application for security for costs, which the defendants elected to pursue, stifled the litigation at the minimal cost of bringing the application.
- In those circumstances, the court found no compelling reason for the defendants to receive an indemnity from the liquidators for the small cost of achieving this result'.[83]

In short, the discretion miscarried.

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[81] (1992) 174 CLR 178; *Kimtran Pty Limited & Anor v Downie & Anor* [2003] QCA 424 (Unreported, McMurdo P and Dutney and Philippides JJ, 26 September 2003) [19] (Dutney J).
[82] *Kimtran Pty Limited & Anor v Downie & Anor* [2003] QCA 424 (Unreported, McMurdo P and Dutney and Philippides JJ, 26 September 2003) [21] (Dutney J).
[83] Allens Arthur Robinson, 'Costs orders against liquidators reversed' *Annual Review of Insolvency and Restructuring Law 2003* 147.

Although the liquidators succeeded in the end, they did so in context of the spectre of potential personal liability where a liquidator is 'litigating in the name of an insolvent company'.[84]

I conclude with a case fortunately more conceptual than procedural: ***Surfers Paradise Investments Pty Ltd (in liquidation) v Davoren Nominees Pty Ltd***.[85] The appellant, Surfers Paradise Investments, was the registered proprietor of three blocks of land.

- 'In June 1999, Surfers Paradise Investments (SPI) mortgaged the lots to Davoren Nominees Pty Ltd.
- After an administrator was appointed to SPI, Davoren served a notice of exercise of power of sale.
- In May 2000, a liquidator was appointed to SPI.
- In June 2001, Davoren contracted to sell two lots for $1.3 million.
- In August 2001, Davoren lodged a proof of debt disclosing the existence of the mortgage (to which it attributed no value) and indicating that SPI owed it $2,205,498'.[86]

After completion of the sale of the two lots Davoren provided an amended schedule setting the debt as approximately $1.1 million.[87] The liquidator then forwarded a dividend cheque to Davoren for $53,992, which Davoren banked.[88] Subsequently, Davoren entered into a contract to sell the remaining lot of land for $950,000. SPI sought a declaration that Davoren had surrendered its mortgage and, in so doing, had made a binding election to surrender the security.[89]

This case interestingly illustrates the significance of accepting payment under a proof of debt, in relation to the prima facie indefeasible title of a security holder. 'The only basis, [it was said in the Court of Appeal], on which [Davoren] was entitled to receive

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[84] Ibid.
[85] (Unreported, Queensland Court of Appeal, Williams and Jerrard JJA and Dutney J, 24 October 2003).
[86] Allens Arthur Robinson, 'Secured creditors: don't surrender your rights' *Annual Review of Insolvency and Restructuring Law 2003* 130.
[87] *Surfers Paradise Investments Pty Ltd (in liquidation) v Davoren Nominees Pty Ltd* (Unreported, Queensland Court of Appeal, Williams and Jerrard JJA and Dutney J, 24 October 2003) [19] (Dutney J).
[88] Ibid [20].
[89] Ibid [24-26]; Allens Arthur Robinson, 'Secured creditors: don't surrender your rights' *Annual Review of Insolvency and Restructuring Law 2003* 130.

and retain the dividend payment was if the debt on which the dividend was based was the balance due after realising, valuing or surrendering the security'. The security for the third lot of land had not been realised and no value was placed on the security for the purpose of the proof of debt.[90]

I set out the terms of s 554E of the *Corporations Act*:

> (1) In the winding up of an insolvent company, a secured creditor is not entitled to prove the whole or a part of the secured debt otherwise than in accordance with this section and with any other provisions of this Act or the regulations that are applicable to proving the debt.
> (2) The creditor's proof of debt must be in writing.
> (3) If the creditor surrenders the security to the liquidator for the benefit of creditors generally, the creditor may prove for the whole of the amount of the secured debt.
> (4) If the creditor realises the security, the creditor may prove for any balance due after deducting the net amount realised, unless the liquidator is not satisfied that the realisation has been effected in good faith and in a proper manner.
> (5) If the creditor has not realised or surrendered the security, the creditor may:
> (a) estimate its value; and
> (b) prove for the balance due after deducting the value so estimated.
> (6) If subsection (5) applies, the proof of debt must include particulars of the security and the creditor's estimate of its value.

That derives from the principles enunciated by Sir George Jessel as long ago as in 1879 in *Moor v Anglo-Italian Bank*:[91] 'In bankruptcy, if a secured creditor wants to prove, he must do one of three things: he may give up his security altogether and prove for the full amount, or he may get his security valued and prove for the difference, or he may sell and realize his security and then prove for the difference'.

The Court held Davoren's conduct amounted to the surrender of its security, under s 554E. Despite finding that Davoren did not have the actual intention to surrender the security, following the reasoning in *Champtaloup v Thomas,*[92] 'an election to surrender a security could occur, irrespective of intention, where, faced with a choice

[90] *Surfers Paradise Investments Pty Ltd (in liquidation) v Davoren Nominees Pty Ltd* (Unreported, Queensland Court of Appeal, Williams and Jerrard JJA and Dutney J, 24 October 2003) [27] (Dutney J.
[91] (1879) 10 Ch D 681, 689-690 (Jessel MR).
[92] [1976] NSWLR 264, 274-275 (Mahoney J, Street CJ agreeing).

between inconsistent positions, a party's conduct unequivocally chose between those positions'.[93] This election occurred when Davoren banked the dividend cheque, as it only became entitled to the dividend by surrendering the security.[94] The Court declared Davoren had surrendered its security and Surfers Paradise Investments was entitled to the proceeds of the sale of the third lot of land. This judgment confirmed both the subjective and objective nature of the test, 'whether a secured creditor has elected to surrender its security'.[95]

Ladies and gentleman, many things topical are interesting, whether or not they are amusing. The matters covered this morning have been topical, significant, and while serious – I trust helpful.

[93] Allens Arthur Robinson, 'Secured creditors: don't surrender your rights' *Annual Review of Insolvency and Restructuring Law 2003* 130.
[94] *Surfers Paradise Investments Pty Ltd (in liquidation) v Davoren Nominees Pty Ltd,* Unreported, Queensland Court of Appeal per Williams and Jerrard JJA and Dutney J, 24 October 2003, [37].
[95] Allens Arthur Robinson, 'Secured creditors: don't surrender your rights' *Annual Review of Insolvency and Restructuring Law 2003* 131.