DISTRICT COURT OF QUEENSLAND

CITATION:	*Queensland Quarry Group Pty Ltd ACN 160 549 388 (In Liquidation) & Anor v Cosgrove* [2019] QDC 26
PARTIES:	**QUEENSLAND QUARRY GROUP PTY LTD ACN 160 549 388 (IN LIQUIDATION)** (first plaintiff) and **NICK JIM COMBIS AS LIQUIDATOR OF QUEENSLAND QUARRY GROUP PTY LTD ACN 160 549 388 (IN LIQUIDATION)** (second plaintiff) v **HELEN LOUISE COSGROVE** (defendant)
FILE NO.:	1027 of 2017
DIVISION:	Civil
PROCEEDING:	Trial
DELIVERED ON:	13 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	14, 15 and 27 February 2019
JUDGE:	Rosengren DCJ
ORDER:	**1. Second plaintiff's claim is dismissed** **2. Second plaintiff pay the defendant's costs**
CATCHWORDS:	CORPORATIONS – PREFERENCES AND VOIDABLE TRANSACTIONS – where payments were made to the defendant while the company was insolvent – whether two of the payments were converted from unsecured to secured debts – whether these two payments were unfair preference payments under s 588FA of the *Corporations Act 2001* (Cth) CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – EFFECT OF WINDING UP ON OTHER TRANSACTIONS – PROTECTED

TRANSACTIONS – DEALINGS IN GOOD FAITH – whether the transactions were made in good faith within the meaning of s 588FG(2) - whether reasonable grounds to suspect insolvency – where delay in payments – where statutory demand and winding up application

Corporations Act 2001 (Cth) ss 588FA, 588FC, 588FE, 588FF, 588FG(2)
Uniform Civil Procedure Rules 1999 (Qld) r 681

Bank of Australasia v Hall (1907) 4 CLR 1514
Barton v Official Receiver (1986) 161 CLR
Burns v Stapleton (1959) 102 CLR 97
Chicago Boot Co Pty Ltd v Davies (2011) 282 ALR 378
Cussen v Commissioner of Taxation (2004) 51 ACSR 530
Cussen v Sultan (2009) 27 ACLC 1650
Dean-Willcocks v Federal Commissioner of Taxation (2008) 73 ATR 801
Downey v Aira Pty Ltd (1996) 14 ACLC 1068
International Cat Manufacturing Pty Ltd v Rodrick [2013] QSC 91
K & R Fabrications (Qld) Pty Ltd (in liq) (1980) 49 FLR 350
Muller v McIntosh (as joint and several liquidators of Arafura Equities P/L (in liq) v Academic Systems P/L [2007] QCA 218
National Australia Bank Ltd v KDS Construction Services Pty Ltd (1987) 163 CLR 668
Olifent v Australian Wine Industries Pty Ltd (1996) 130 FLR 195
Queensland Bacon Pty Ltd v Rees (1966) 115 CLR 266
Re Ermayne Pty Ltd [1998] SASC 3
Robertson v Grigg (1932) CLR 257
Sandell v Porter (1966) 115 CLR 666
Sands & McDougall (Wholesale) Pty Ltd (in lia) v Federal Commissioner of Taxation (Cth) [1999] 1 VR 489
Sydney Appliances Pty Ltd (in liq) v Eurolinx Ltd (2001) 19 ACLC 633
Tamaya Resources Ltd (in liq) v Claymore Capital Pty Ltd [2015] FCA 357
Williams v Peters [2010] 1 Qd R 475

COUNSEL: D Topp for the second plaintiff
GW Dietz for the defendant

SOLICITORS: ClarkeKann for the second plaintiff
Sciacca & Associates Pty Ltd for the defendant

[1] The second plaintiff ('the Liquidator') claims that on 14 October 2014 and 3 November 2014, when the first plaintiff company ('the Company') was insolvent, the defendant received from the Company four separate payments totalling $361,250. An order is sought for repayment of these monies. The Liquidator alleges that each transaction constitutes an unfair preference within the meaning of s 588FA of the *Corporations Act 2001* (Cth) ('the Act), is an insolvent transaction within the meaning of s 588FC of the Act, is a voidable transactions within the meaning of s 588FE of the Act and are thereby each voidable as against the defendant.

[2] The claim is defended on the basis that two of the four payments do not constitute unfair preferences. Alternatively, the defendant contends an entitlement to the protection of s 588FG(2) of the Act in respect of each of the four payments.

[3] The trial proceeded before me on 14, 15 and 27 February 2019. The Liquidator's Solvency Report of 6 March 2017 was admitted into evidence by consent. The defendant and her husband, Allan Cosgrove gave evidence. As the transcript shows, but without recapturing fully the atmosphere of the trial, both witnesses gave credible evidence, most of which was uncontested. Having seen and heard the defendant being cross-examined at length, I consider her explanations were convincing as to her belief that the Company was not insolvent. Where appropriate, I have made findings of fact below.

Uncontentious facts

[4] In early 2013 there were a number of oral discussions between the defendant, Brett Stevens, Shannon Bugg, Lawrence Hargreave, David Collard and Russell Hardy for a joint venture to be formed to own and operate a quarry and develop land. It was intended that the joint venture be conducted through a trust called the Bohag Trust. The quarry was to be operated from land at 26838 Carnavon Highway, Tingun ('the Property'), which was owned by the defendant as the trustee of The Sutton Grange Trust. At this time the Property was being used by the defendant and her husband for grazing cattle. As an additional source of income, they were removing gravel from the Property for sale.

[5] The documents tendered as exhibits at trial provide the following chronology.

[6] In about April 2013, with the consent of the defendant, Mr Stevens entered into possession of the Property for the purpose of operating the quarry. The joint venture arrangement had not yet been properly documented. As events transpired, Mr Stevens was unable to perform his obligations under the joint venture arrangement.

[7] A lease was executed between the parties ('the Lease'). It was signed by the defendant on 2 October 2013 and on behalf of the Company on 8 October 2013. The commencement date was 1 July 2013. Pursuant to the Lease, the Company were permitted to use the Property for the extraction of quarry product from it. Item 4 of the Lease provided that the royalty fees to be paid to the defendant were $2.00 (exclusive of GST) per tonne of product extracted from the Property and the rent was $10 (exclusive of GST) per month.

[8] In December 2013, a person from a neighbouring property telephoned the defendant to complain about the dust being generated from the quarry and the adverse health consequences it was causing.[1]

[9] On 13 December 2013, the defendant applied to be substituted in a winding up application in respect of the Company. The original creditor had been Carlswood Pty Ltd who had issued a statutory demand which the Company did not comply with. Carlswood Pty Ltd had reached an agreement with the Company. The defendant also subsequently reached an agreement with the Company, which involved the Company paying her $10,201.67.[2]

[10] In early January 2014, the defendant commissioned a report from an environmental management company as to the Company's compliance in the operation of the quarry. The report identified a number of issues and the defendant instructed her solicitors to send to the Company notices to remedy breach of the Lease ('breach notices').[3]

[11] On 3 February 2014, the defendant filed proceedings in the Supreme Court of Queensland against the Company. The principal claim was for $249,150 in unpaid royalty fees under the Lease ('the February 2014 court proceedings').[4]

[12] Four days later the defendant received a 'show cause notice' from the local council because of the Company's quarry operations. The defendant had also become concerned that the Company was operating the quarry outside the permitted hours of between 6am and 6pm. This was from her own observations and from information conveyed to her by the neighbour.[5]

[13] The Company did not comply with the breach notices to the satisfaction of the defendant. For this reason, on 19 February 2014 she sought to take repossession of the Property. On account of what the defendant describes as *'the complete breakdown of the relationship'* between the Company and herself, she engaged the assistance of her husband and a security company to chain and padlock the gates to the Property. There was an altercation between the defendant's husband and Mr Stevens over this.[6]

[14] On 27 February 2014, the Company obtained an interim court order requiring the defendant to hand back possession of the Property pending the determination of its application for an interlocutory injunction.

[15] Two days later the defendant received correspondence from the Department of Natural Resources and Mines – Water Service. There was a water bore on the Property and a concern was raised that the Company was using the water from the bore for its quarry operations contrary to the water licence which had been granted.[7]

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[1] Exhibit 26, para 46.
[2] Exhibit 26, para 74-76.
[3] Exhibit 26 para 53-56.
[4] Exhibit 8.
[5] Exhibit 26, para 59-64.
[6] Exhibit 30, para 12-14.
[7] Exhibit 26, para 65-68.

[16] In late February 2014, the defendant was told that Onsite Rental Group Operations Pty Ltd were owed a substantial amount of money by the Company. By early March 2014, the defendant was also aware that another three service providers, M&S Lucht Earthmoving, SKS Haulage and Graham Earthmoving were owed money by the Company. It was her understanding from a conversation with her husband that the amount of money owing to Graham Earthmoving was in the order of $120,000.

[17] The defendant received a series of abusive texts from Mr Stevens on 6 March 2014.[8]

[18] On 10 March 2014, the application for the interlocutory injunction was heard. Submissions were filed by counsel for the defendant and Mr Cosgrove and were relied on in opposing the application. In those submissions it was said that the quarry operations were at an end in circumstances where the Company at that time had no planning approval to use the Property and was operating the quarry in contravention of the conditions of the environmental licence. It was further submitted that any undertaking the Company provided as to damages would be worthless. The submissions referred to the previous winding up application by Carlswood Pty Ltd, as well as the fact that the Company owed the other debts to third parties.[9]

[19] The defendant's husband provided an affidavit for the purposes of the abovementioned application. He inter alia deposed to having observed over the previous nine months, hundreds of trucks exiting the quarry filled with extracted product.[10]

[20] A mediation was held between the Company, the defendant and a number of other parties on 1 April 2014. A settlement was reached. As between the Company and the defendant, the Settlement Agreement provided for the defendant to sell the Property for $1,750,000 to an entity nominated by Defwom Property Management Pty Ltd ('Defwoms'). Mr Stevens was associated with this company. It also provided for Defwoms to pay an additional sum of $75,000 within 30 days as a non-refundable payment for arrears of royalty fees. The Settlement Agreement also provided for any further sum for royalty fees to be assessed by an accountant nominated by the Cosgroves. Such an assessment was undertaken by Vincents. The royalty fees and rental due to the defendant were assessed to be approximately $150,000. However, this assessment was said to be incomplete by virtue of the fact that the Company did not provide the necessary documentation.[11] The defendant agreed to this. A contract for the sale of the Property was entered into between the defendant as vendor and Defwoms as purchaser on 29 April 2014. The date for completion was 29 July 2014. The purchase price was $1,750,000.[12]

[21] By email dated 26 May 2014, the solicitors for the Company forwarded a new contract to the solicitors for the defendant in which the purchaser had been changed from Defwoms to the Company. The reason given for this was that the financiers

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[8] Exhibit 25.
[9] Exhibit 27.
[10] Exhibit 30, para 26.
[11] Exhibit 24.
[12] Exhibit 12.

would only proceed with the finance application if it was made by the Company. This was because the Company was regarded as having a more suitable trading history than Defwoms.[13]

[22] A new contract was entered into between the Company and the defendant in June 2014 ('the June 2014 Contract'). The date for completion remained 29 July 2014. All other conditions remained the same.

[23] On 2 July 2014, the solicitors for the Company requested an extension of the date for completion of the June 2014 Contract to 29 September 2014. In consideration of the extension, the Company offered to pay to the defendant $25,000 for arrears in royalty fees and $20,000 for arrears in rent, both of which would be payable by 31 August 2014. The defendant agreed to this. The parties also agreed that if the June 2014 Contract was not completed by 29 September 2014 by reason of the default of the Company, it would pay the defendant $200,000 as a liquidated debt.[14]

[24] The Company did not pay the $45,000 by 31 August 2014. It also did not complete the June 2014 Contract or pay the defendant the $200,000 as had been agreed.

[25] In order to recover the $45,000, the defendant issued a statutory demand on 4 September 2014. The Company had 21 days to pay the sum or apply to have the statutory demand set aside.[15] It was not paid by the Company and there was no application to have it set aside.

[26] By email dated 26 September 2014, the Company requested a 48 day extension for the completion of the June 2014 Contract. This was rejected by the defendant in correspondence dated 29 September 2014. The defendant terminated the June 2014 Contract.[16]

[27] On 3 October 2014, the defendant filed an application to wind up the Company on the grounds of insolvency.[17] On 8 October 2014, the solicitors for the Company informed the solicitors for the defendant that the Company had instructed that it was in a position to pay the defendant the $45,000, plus reasonable costs by 13 October 2014.

[28] There were ongoing negotiations between the parties. These included suitable terms for resolving the defendant's claim for $45,000 and entering into a further contract for the sale of the Property to the Company. An agreement was ultimately reached and was recorded in a Deed of Agreement dated 14 October 2014 ('the Deed")[18]. The Deed relevantly provides:

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[13] Exhibit 11.
[14] Exhibit 14.
[15] Exhibit 4.
[16] Exhibit 15.
[17] Exhibit 5.
[18] Exhibit 2.

"OPERATIVE PROVISIONS

1. Winding Up Proceedings

1.1 QQG will pay Cosgrove the sum of $45,000 plus Cosgrove's costs of $16,250 on 14 October 2015.

1.2 Upon payment of the said sum Cosgrove will use best endeavours to withdraw the Winding Up Application.

2. Contract of Sale

2.1 Contemporaneously with this Deed:

(a) the parties shall enter into the Second Contract of Sale;

(b) QQG shall provide to Cosgrove a document which will be capable of immediate registration with the Qld Titles Office which surrenders the Lease ("the Surrender") which will be held in Escrow by Cosgrove and be dealt with in accordance with the terms of this Deed;

2.1.2 On or before the date for payment of the deposit under the Contract QQG shall pay in cleared funds to Cosgrove an amount of $50,000- for rent under the Lease which QQG acknowledges is due and payable as such and shall not be refundable except in the event of default by Cosgrove.

...

3. Release & Discharge

3.1 On completion of the Second Contract of Sale or surrender of the Lease as provided for in clause 2.3 the parties shall be deemed to have released and discharged each other from all claims, causes of action, obligations and liabilities or whatsoever nature (including rental, royalties, liquidated damages costs and expenses), past or present, including but not limited to those in relation or incidental to:

(a) the Lease;
(b) the Property;
(c) the Dispute;
(d) the Settlement Agreement;
(e) the First Contract of Sale;
(f) the First Contract of Sale Variation;
(g) the Winding Up Proceedings.

..."

[29] The further contract was entered into on the same day, being 14 October 2014 ('the October 2014 Contract').[19] The date for completion was 30 January 2015. The purchase price of the Property was $2,500,000. The deposit was $250,000 and was payable within 21 days. It was a special condition that the deposit would become non-refundable and immediately forfeited to the defendant except in the event of a default by the defendant.[20]

[30] In accordance with the Deed, the Company paid the defendant the sums of $45,000 ('the Demand Debt Payment') and $16,250 ('the Costs Payment') on 14 October 2014. The surrender of Lease was executed by the Company on 16 October 2014. The Company paid to the defendant the further sums of $250,000 for the deposit for the October 2014 Contract ('the Deposit Payment') and $50,000 for rent arrears ('the Rent Debt Payment') on 3 November 2014.

[31] The Company did not complete the October 2014 Contract as required by 30 January 2015. By letter dated 3 February 2015, the defendant terminated this further contract and took repossession of the Property.[21] WZL Haulage Pty Ltd had issued a creditor's statutory demand and then instituted winding up proceedings against the Company for payment of a debt. The defendant substituted into the winding up proceedings and wound up the Company.

Unfair preference – s 588FA

[32] To be an unfair preference pursuant to s 588FA of the Act, the company and the creditor need to be parties to the transaction.[22] Further, the transaction must result in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than would be received in respect of the debt if the creditor was required to prove for the debt in the winding up of the company.[23] The liquidator bears the onus of proving that the transaction was preferential and thereby unfair.

[33] The defendant admits the Demand Debt Payment and the Rent Debt Payment were unsecured debts and thereby unfair preferences. The issue remains as to whether the Costs Payment and the Deposit Payment can be characterised in the same way. The Liquidator contends that these latter two transactions were unsecured debts that were converted to secure debts. Such debts have a preferential effect.[24] However, it is well settled that a payment in discharge of a valid security cannot constitute a preference.[25]

[34] I have addressed each of these transactions below.

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[19] Exhibit 3.
[20] Exhibit 3.
[21] Exhibit 23.
[22] Subsection 1(a).
[23] Subsection 1(b).
[24] *Burns v Stapleton* (1959) 102 CLR 97 at 105.
[25] *Robertson v Grigg* (1932) CLR 257; *National Australia Bank Ltd v KDS Construction Services Pty Ltd* (1987) 163 CLR 668 at 679.

Costs Payment

[35] The crux of the Liquidator's submission is that because the defendant has conceded that the Demand Debt Payment is unsecured, the consequential entitlement to costs must also be unsecured. This is in circumstances where the defendant was given the right to commence winding up proceedings in respect of the Demand Debt Payment after the Company did not comply with the statutory demand within the required period of 21 days.

[36] The Liquidator contends that the defendant was all but guaranteed of securing a costs order if the Company paid the statutory demand sum thereby forcing a discontinuance of the wind up proceedings. This is because rule 681 of the *Uniform Procedure Rules 1999* (Qld) ('the UCPR') provides that costs of a proceeding are in the discretion of the court but follow the event, unless the court orders otherwise. Therefore, according to the Liquidator, the Company's liability to pay the Costs Payment had emerged prior to and independently of the Deed and the effect of the Deed was to simply quantify the amount of the costs.

[37] I am not persuaded by the Liquidator's submissions in this regard. The fact that there is a general rule that costs follow the event is not the answer. There was no liability on the Company to make the Costs Payment until it became a party to the Deed. The liability arises pursuant to clause 1.1 of the Deed. At the time of the execution of the Deed, the Court proceedings the subject of the liability to pay the Costs Payment had not even come before the Court for hearing. Indeed, during negotiations and prior to the execution of the Deed, the Company had expressly rejected paying to the defendant an amount for costs in the amount that it ultimately paid by making the Costs Payment.

Deposit Payment

[38] Although this was not the pleaded case, the Liquidator in both written and oral submissions urged upon me a finding that the Deposit Payment of $250,000 was in effect the defendant's way of 'clawing back' previous liabilities of the Company.

[39] The previous liabilities were said to be two-fold. First, there was the $200,000 which was payable by the Company to the defendant as a liquidated debt in the event that the Company did not complete the June 2014 Contract or otherwise under the June 2014 Contract. Second and alternatively, there was the previous liability of $249,150 on account of the unpaid royalty fees, which was the amount claimed in the February 2014 court proceedings. Neither of the amounts had been paid by the Company to the defendant at the time of entering into the Deed.

[40] In support of the submission, the Liquidator points to clause 3 of the Deed. This clause expressly provides that upon completion of the October 2014 Contract or surrender of the Lease, the parties mutually released and discharged each other from all claims, causes of action, obligations and liabilities of any nature. I am not persuaded by the Liquidator's submission in this regard. There is no reference in clause 3 or indeed in any other clause in the Deed to either the $200,000 liquidated debt or the $249,150 the subject of the February 2014 court proceedings.

[41] The liability to pay the $250,000 does not arise under the Deed but rather under the October 2014 Contract. It is not expressed to be referrable to any pre-existing liability. While it is close in quantum to the amount claimed of $249,150 for unpaid royalty fees in the February 2014 court proceedings, clause 1.1 of the Deed expressly provides for the payment of $45,000 for unpaid royalty fees and rent. Clause 2.1.2 also expressly provides for the payment of another specific sum, being $50,000 for unpaid rent under the Lease.

[42] The defendant was cross-examined at some length about this 'clawing back' contention. She repeatedly denied that the Deposit Payment of $250,000 represented any such attempt on her part.[26] It was suggested to her that this was the reason why the purchase price for the Property had increased from $1,750,000 in the June 2014 Contract to $2,500,000 in the October 2014 Contract. The defendant rejected this. Her evidence, which I accept, was that this increase was explicable by the increase in the value of the Property. This was in circumstances where the Company had been granted a million tonne permit in the intervening period between the two contracts. The defendant explained that she thought the figure of $250,000 for the deposit represented 10% of the purchase price, which is standard in the real estate industry.

[43] Further, in paragraph 14 of the Liquidator's submissions, reliance is place on some oral evidence given by the defendant to bolster the submission in this regard. This was her acknowledgement in re-examination that following the mediation on 1 April 2014, there remained an issue in relation to her recovering payment from the Company of amounts which she claimed were owing. However, a review of the transcript reveals that the remaining issue to which the defendant was in fact referring was the accounting analysis which the parties had agreed to undertake as provided for in the Settlement Agreement. This was ultimately undertaken by Vincents.

[44] For the abovementioned reasons I am not persuaded by this Liquidator's submission in this regard. To the contrary, I am satisfied there was no liability in the Company to pay the Deposit Payment until the execution of the October 2014 Contract. Therefore the Deed did not have the effect of converting the Deposit Payment from an unsecured to a secured debt.

Conclusion

[45] It follows that I am satisfied the defendant did not receive an unfair preference from the Company under s 588FA of the Act in the form of the Costs Payment or the Deposit Payment. If I am wrong about this, in my view it makes no difference to the ultimate outcome. This is because the Costs Payment was made on the same day as the Demand Debt Payment and the Deposit Payment was made on the same day as the Rent Debt Payment. I am satisfied the defendant's onus has been discharged in relation to its defence under s 588FG(2) of the Act with respect to both the Demand Debt Payment and the Rent Debt Payment. The reasons for this are addressed in detail below.

[26] T1-68, ln 11-48.

Statutory defence – s 588FG(2)

[46] A transaction which confers an unfair preference becomes by operation of s 588FC an insolvent transaction if it was entered into at a time when the company was insolvent. Section 588FE(2) then provides that such a transaction is voidable if it was entered into during the six months ending on the relation-back day. Where the court is satisfied that a transaction is voidable, s 588FF(1) provides that it may make an order directing repayment of an amount equal to the sum paid in the transaction in question.

[47] The defendant admits that the Demand Debt Payment and the Rent Debt Payment are voidable transactions but relies on the defence under s 588FG(2) of the Act. The test is a demanding one.[27] To succeed, the defendant must establish each of the elements, namely:

(i) she became a party to each of the transactions in good faith;
(ii) she subjectively did not then have reasonable grounds for suspecting that the Company was insolvent or would become insolvent by making each of the payments;
(iii) when considered objectively, no reasonable person in her circumstances would have suspected insolvency; and
(iv) valuable consideration was provided under each of the transactions.[28]

[48] These elements overlap to some extent. For example, it would be difficult for a creditor who had an actual suspicion on reasonable grounds that the company making the payment was insolvent, to say that it was acting in good faith in receiving the payment.

[49] The question of solvency of a company for the purposes of the Act is to be determined by reference to the commercial realities of the transaction as a whole.[29] The facts and circumstances need to be viewed as they unfolded at the time, without the benefit of hindsight. It is necessary to have regard to the accumulation of all relevant events.[30]

[50] The question is whether the company is able to pay its debts with monies actually available.[31] It is relevant to take into account not only cash resources immediately available but also further money that will become available within a relatively short time, relative to the nature and amount of the debts and to circumstances, including the nature of the business and debtor.[32]

[51] There are two separate transactions requiring determination. The first, being the Demand Debt Payment, which was made on 14 October 2014. The second, being the Rent Debt Payment, which was made a little less than three weeks later, on 3 November 2014.

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[27] *Sands & McDougall (Wholesale) Pty Ltd (in lia) v Federal Commissioner of Taxation (Cth)* [1999] 1 VR 489.
[28] *Williams v Peters* [2010] 1 Qd R 475 at [55].
[29] *International Cat Manufacturing Pty Ltd v Rodrick* [2013] QSC 91 at [106]; *Williams v Peters* [2010] 1 Qd R 475.
[30] *Sydney Appliances Pty Ltd (in liq) v Eurolinx Ltd* (2001) 19 ACLC 633.
[31] *Bank of Australasia v Hall* (1907) 4 CLR 1514 at 1528.
[32] *Sandell v Porter* (1966) 115 CLR 666 at 670.

[52] I have considered each of the elements in the defence in respect of each of the transactions in turn below.

Reasonable suspicion

[53] The defendant must satisfy a subjective and an objective test.[33] She was a retired land owner. The objective element requires an application of the 'reasonable business person' test.[34]

[54] Suspicion is "something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear."[35] The relevant suspicion is one of actual and existing insolvency as distinct from impending or potential insolvency.[36] What matters is not the actual situation of the Company's finances, but what information the defendant had and whether it was grounds to suspect that the Company was insolvent. The test will not be satisfied if a creditor is genuinely blind to an objectively obvious insolvency.

[55] There is generally no single factor whose presence invariably establishes that there was, or should have been, reasonable grounds for suspicion.[37] Once the factors pointing to insolvency have been identified, it is then necessary to ascertain which of those factors were apparent to the defendant, and the cumulative impact of that knowledge of them had, or should have had on the defendant. There may be countervailing factors and circumstances to be weighed in the balance which could have tended to dispel the suspicion at the relevant time.[38]

[56] The first transaction that needs to be considered is the Demand Debt Payment made on 14 October 2014. It is necessary to look at the situation at the time this payment was made.

[57] The trading relationship between the Company and the defendant is relevant and was explored at some length at the trial. I accept the defendant's and Mr Cosgrove's evidence about this. It was largely uncontested. The relationship between Mr Stevens on behalf of the Company and the Cosgroves soured from late 2013, within a short time of the execution of the Lease.

[58] The defendant signed the Lease at a meeting with Mr Stevens on 2 October 2013. At the time Mr Stevens was managing the quarry operations at the Property for the Company. It was Mr Stevens who presented the Lease at the meeting. He told the defendant that the reason the Company required the Lease was because the finance company providing the capital which was necessary to continue the quarry operations had requested it. The defendant felt as though she was being pressured into signing the Lease.[39]

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[33] *Downey v Aira Pty Ltd* (1996) 14 ACLC 1068.
[34] *Cussen v Commissioner of Taxation* (2004) 51 ACSR 530; *Williams v Peters* [2010] 1 Qd R 475 at [55].
[35] *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266.
[36] *Dean-Willcocks v Federal Commissioner of Taxation* (2008) 73 ATR 801.
[37] *Tamaya Resources Ltd (in liq) v Claymore Capital Pty Ltd* [2015] FCA 357 at [34].
[38] *Sydney Appliances Pty Ltd (in liq)v Eurolinx Ltd* [2001] NSWSC 230 at [43]-[47].
[39] Ex 26, para 24.

[59] From the defendant's perspective, over the coming weeks and months the Company failed to pay the royalty fees and rent owed to her under the Lease. The Company created problems with the neighbours. It used water from a bore on the Property in breach of the existing water licence. The defendant received a 'show cause notice' from the local council for the Company's breaches of environmental obligations relevant to the Property. This exposed the defendant to proceedings under the *Sustainable Planning Act* 2009 (Qld). There was the altercation at the gates to the Property between the defendant's husband and Mr Stevens on 19 February 2014. The text messages which are Exhibit 9 also shed some light on the animosity between the parties. They reveal a certain level of vindictiveness on the part of Mr Stevens.

[60] While after the mediation the defendant's husband would occasionally speak with Mr Hardy on behalf of the Company, the Cosgroves relationship with Mr Stevens remained very strained. This is perhaps not surprising given that by this time there was so much water under the bridge. They regarded Mr Stevens as remaining to have the day to day responsibility for the operations of the quarry. The Cosgroves had been required to move their cattle off the Property. The Company continued to delay in the payment of royalty fees and rent owing to the defendant.

[61] In evidence, the defendant said that it was a common business practice for the Company not to pay money owing when it fell due.[40] It had been a situation that had existed from late 2013. The defendant thought the acrimonious relationship between the parties contributed to this.[41] Given that the delays in payment had commenced some 12 months before the Company was insolvent, it is not as relevant a factor as it may be in other cases.[42]

[62] Counsel for the Liquidator points to the fact that within 22 days of the mediation the Company again had an outstanding debt to the defendant in the sum of $5,000. According to the defendant, this is but one example of the Company delaying in paying her on account of the relationship between the parties. She gave the following evidence, which I accept.

> *"Well, it is the case, is it not, that within 22 days, the wheels had already started falling off that QQG already couldn't pay you a mere amount of $5000?---This all goes back to our relationship with QQG. You're saying that I didn't – that I knew they owed money. All I can tell you is that I could see the product from my farm being taken and us not receiving the payment.*
>
> *That's what I mean?---What they did with that money, I don't know.*
>
> *That's what I mean?---Okay.*
>
> *By as early as 22 April, so only 22 days after the mediation, your lawyers, now and then – present – had to then seek payment - - -?---But we had - - -*

[40] T1-40, ln 1-2.
[41] T1-30, ln 10-14.
[42] *Re Ermayne Pty Ltd* [1998] SASC 3.

> *- - - to chase up a $5000 payment?---This was nothing unusual. We have had to do this our whole – in all of our interactions with Brett Stevens and QQG. He has made us pursue to the nth degree before we received – pardon me – any payments.*
>
> *Could you - - -?---It was nothing unusual."*[43]

[63] The Liquidator further contends that the defendant cannot successfully establish this element of the statutory defence given that the Company's debt the subject of the statutory demand remained unsatisfied 21 days after it had been served and the defendant understood the legal consequences of this.[44]

[64] As to the defendant's understanding of the legal consequences, her evidence was that the Company would be *'wound up, that they're finished*'. She then went on to explain that she did not expect the Company in this case to be wound up. Rather, it was her expectation that the Company would pay the money the subject of the statutory demand "*as they had every other time I've taken them to court."*[45] Further, the state of insolvency that arises by reason of non-compliance with a statutory demand is a rebuttable presumption only. Therefore, I am not persuaded that the defendant's evidence of her knowledge of the statutory demand process has the consequence contended for by the Liquidator.

[65] It is to be accepted that an inference would ordinarily be open that a creditor who goes to the lengths of serving a statutory demand as a means of recovering a debt, which is due and payable and about which there is no dispute, will face significant challenges discharging the onus of establishing a defence under s588FG(2).[46] This is in circumstances where the payment the subject of the statutory demand is made and the winding up follows within the ensuing six months. The inference can be more readily drawn where the creditor believes that the debt has not been paid because the company is unable to pay its debts as and when they fall due and also where within the period provided for by that demand, the creditor accepts a lesser sum in full settlement.[47]

[66] I do not regard the service of the statutory demand and the subsequent winding up application in the circumstances of this case necessitating an inference of insolvency. There are a number of reasons for this. Relevantly, the defendant did not accept a lesser sum in full settlement. To the contrary, the Company paid the entire amount the subject of the statutory demand, together with costs.[48]

[67] The patterns of delayed payments had been broadly consistent during the course of the dealings between the parties. This had not been the first occasion where to the

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[43] T1-54, ln 30-47.
[44] Liquidator's submissions, paras 33-41.
[45] T1-57, ln 15-19.
[46] *K & R Fabrications (Qld) Pty Ltd (in liq)* (1980) 49 FLR 350*; Muller v Academic Systems Pty Ltd* [2007] QCA 218 at [41]; *Chicago Boot Co Pty Ltd v Davies* (2011) 282 ALR 378.
[47] *Muller v McIntosh (as joint and several liquidators of Arafura Equities P/L (in liq) v Academic Systems P/L* [2007] QCA 218.
[48] Being the Demand Debt Payment and the Costs Payment.

knowledge of the defendant, a creditor of the Company had resorted to the statutory demand process to recover a debt. The payment by the Company of the outstanding debt to Carlswood Pty Ltd had unfolded in a similar way. On that occasion the Company did not comply with the statutory demand process and it was not until Carlswood Pty Ltd had applied to wind up the Company that the debt was paid. There is no suggestion a lesser sum was paid by the Company to this creditor. The defendant then substituted as the applicant in that winding up application and the Company paid the defendant $10,201.67.

[68] From the defendant's perspective the quarry operations appeared to be thriving. This remained the situation in October and November 2014. Her evidence was that the quarry was visible from the highway. She would drive by weekly and observe the hive of activity going on. Mr Cosgrove gave similar evidence. He attended the Property regularly prior to the mediation as he was driving trucks for the Company and would carry out maintenance on the Property. After the mediation he would attend the Property from time to time to carry out maintenance.

[69] Counsel for the Liquidator submits that nothing turns on the evidence of the Cosgroves as to what they observed. Two reasons are proffered for this. The first is that it is inconsistent with the contents of the written submissions by the lawyers for the defendant and Mr Cosgrove which were relied on in opposing the Company's application for injunctive relief in March 2014.

[70] The problem with the Liquidator's reliance on these submission is that they relate to a period of time at least seven months prior to when the Demand Debt Payment was made. At this earlier time, the defendant had reason to believe that the Company was operating the quarry illegally and therefore the business was going to be unsustainable. However, this potentially perilous situation for the Company did not continue to exist. In the intervening period prior to the Demand Debt Payment having been made, the Company's environmental compliance issues had been resolved. To the defendant's knowledge, the Company had also exceeded its one hundred thousand tonne approval for the removal of materials from the Property. It had applied for and been granted a million tonne permit for its quarry operations. This was not an inexpensive process.

[71] The other reason why the Liquidator contends that nothing turns on the evidence of the Cosgroves as to their observations of the quarry operations is because it is not uncommon for companies approaching insolvency or who are insolvent to continue trading. This may have some force if the observations of the defendant were to be considered in isolation from other relevant factors. However, to do so would clearly be a misapplication of the law.

[72] Apart from the abovementioned other relevant factors, there is also the evidence of the defendant to the effect that her husband told her that Mr Hardy had relayed to him that the Company's turnover was in the vicinity of $8,000,000. She also knew that the Company was looking at purchasing another quarry in Biloela. Mr Cosgrove confirmed that he had discussed both of these matters with the defendant. He could not remember whether the $8,000,000 represented the Company's turnover or what it had made for the financial year. Little turns on this in circumstances where it is undoubtedly a significant sum of money. Neither the

defendant nor Mr Cosgrove were cross-examined regarding this evidence and I have no reason to doubt the truth or accuracy of it.

[73] It is also of relevance the defendant's description of the quarry as having been '*in a boom time'*.[49] She explained in evidence that this was because there had been flooding in the Roma area over the previous couple of years. This had resulted in a high demand for the materials being extracted from the quarry as they were being used to repair the roads damaged by the flood waters. Further, Mr Cosgrove gave evidence that the Company's quarry was the largest in Queensland covering an area in excess of two and a half thousand acres. It was also unique in that three different types of gravel and two types of sand were being extracted from it. One of the types of gravel was a high grade basalt which was in high demand as it was being used to make roads.

[74] In addition, the defendant explained that she was aware the Company had major contracts with the Department of Main Roads, Councils and other reputable business and that it was her understanding that they were being paid.[50]

[75] As the Liquidator has pointed out, the defendant was aware that the Company also owed money to other creditors. The extent of the defendant's knowledge about these other creditors is detailed above. The following relevant exchange occurred between counsel for the Liquidator and the defendant:

> *"But you did say in – you did say in your affidavit that you believe that other debts were also owing to third parties - - -?---I don't - - -*
>
> *- - - by QQG? -------- have any evidence of that. I – I can only go on the character of Mr Stevens and that leads me to believe that I'm not surprised if he owed money to other parties. I still believe that, if he had to, he had the money and he could have paid us but that his proclivities were that he would cheat people. And I still believe that."*[51]

[76] Shortly thereafter, there was again the following exchange:

> *"No. Well, the letter written on your behalf by Mr Sciacca says the evidence filed in read in support of those proceedings was that QQG was making a substantial sum of money, whereas your own – the evidence filed and read included your affidavit, didn't it? Yes, it did.*
>
> *And it included your complaints that you hadn't been paid by QQG? That's true.*
>
> *And that QQG hadn't been paying other third parties? That's true.*
>
> *That's true. So it's not - - -?---That doesn't - - -*

[49] T1-42, ln 16-20.
[50] T1-53 to 1-54.
[51] T1-53, ln 20-27.

> *It's not therefore - - -?---That doesn't equate with them not having the money. I'm saying yes, they weren't paying us, and perhaps they weren't paying other companies, but I don't agree that they didn't have the money."*[52]

[77] The defendant was cross-examined as to whether she had made any enquiries in October or November 2014 as to whether the Company still owed money to Graham Earthmoving and the other creditors whom the defendant had previously understood the Company owed money to. Her evidence was that she did not. By this time she knew that Carlswood Pty Ltd had been paid. There is evidence that the $120,000 owing to Graham Earthmoving related to equipment hired by Mr Stevens for an unrelated business in Emerald. Pit Ponies Pty Ltd and WZL Haulage Pty Ltd are creditors referred to in the Liquidator's Solvency Report. The defendant had no knowledge of either of these businesses over the relevant period.

[78] In all the circumstances I do not consider it is reasonable to have required the defendant to have made any enquiries as to whether monies remained owing to Onsite Rental Group Operations Pty Ltd, M&S Lucht Earthmoving and/or SKS Haulage. There is no duty on a creditor to request further information from a company or to make further inquiry, unless the absence of that information is itself suspicious.[53] I do not consider that to be the case here when regard is had to the defendant's knowledge of the Company's quarry operations in the weeks and months leading up to the Demand Debt Payment as detailed above.

[79] Counsel for the Liquidator also places significant weight on the following exchange between himself and the defendant in the cross examination of her:

> *"Now, you gave evidence that the 19 June 2014 contract came to an end, that you terminated it?---Yes.*
>
> *Yes, because QQG couldn't complete it?---Well, they refused to complete it or couldn't, yes."*[54]

[80] However, this evidence needs to be considered in the context of the defendant's evidence as a whole. She reiterated on numerous occasions her belief that the Company could have paid its debts.[55] I accept her evidence in this regard. An example of such evidence can be found in this exchange with counsel for the Liquidator:

> *"So, hence my point, that – that by 3 November 2014, they still weren't fully complying to the letter of a contract you had with them?---And I – and I say to you that's part of their normal business practice.*
>
> *Well and I say to you that that's because the company was insolvent at the time - - -?---No.*

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[52] T1-54, ln 8-21.
[53] *Cussen v Federal Commissioner of Taxation* (2004) NSWCA 383 at [123].
[54] T1-56, ln 35-40.
[55] For example T1-53, ln 16-27.

- - - and simply couldn't afford to have done so?---I do not believe that.

That they somehow managed to find the money to pay you because they were worried about the surrender?---I didn't have knowledge of their financials. I've already told you that. To all extents and purposes I believe they had the money. What they chose to do with it was not up to me. If it had been up to me we wouldn't be here in court now. And I - - -"[56]

[81] The Liquidator contends that there was necessarily an inference of insolvency when the Company did not complete either the June 2014 Contract or the October 2014 Contract. I am unpersuaded by this submission for a few reasons. First, the date for completion of the October 2014 Contract post-dated the Demand Debt Payment and the Rent Debt Payment and therefore is not relevant. Second, the Liquidator refers to the vastly inflated purchase price in the October 2014 Contract.[57] I do not consider this to be an apt description of the purchase price in the latter contract. The defendant's uncontested evidence which I accept, was that the purchase price increase of $750,000 in the October 2014 Contract is explicable by the increased value of the Property consequential upon the Company having been granted a million tonne permit for its quarry operations. This enabled the Company to extract a significantly greater amount of materials from the Property than had been permitted under the previous permit. Third, while it may have made no commercial sense for the Company to fail to complete the June 2014 Contract, there were other aspects about the Company's operations and conduct which might also be said to have lacked commercial sense. Be this as it may, there were the numerous factors as detailed above, which did not suggest insolvency. Fourth, at the time the Company failed to complete the June 2014 Contract in late September 2014, there is no evidence the Company was aware that it would have to pay more if it was still desirous of purchasing the Property. Fifth, the defendant gave the following evidence in cross-examination, which I accept:

"Probably because, by October 2014, you knew that QQG simply couldn't pay its debts as and when it fell due?---No. I don't agree with that. I've already told you that you we could see what was happening on our property. It's – it's not like it was – it's not rocket science.

But you - - -?---The product was going out. They were receiving payment for it, as far as I knew, so I believed them to be able to – to buy my place.

But you also gave evidence just before on cross-examination that you understood the 21-day significance of the statutory demand was that they'd be "wound up so they are – wound up – they are – that they are finished" were your exact words, Ms Cosgrove?---I – yes, I – and I do understand that, but like I have reiterated to you before, this was a normal business practice for QQG to – to make me take them to court

[56] T1-63, ln 39-46 to T1-64, ln 1-5.
[57] Liquidator's submissions, para 66.

> *and then, at the last minute, they would pay me the money that they were owed. To me, that was a normal way for them to be doing business. Not a very enjoyable one, I can tell you.*
>
> *Well, leave aside your views on what was normal not in their – in their state of mind, Ms Cosgrove, but the true facts, the raw facts, are that they couldn't settle the June 2014 contract, could they?---I don't know that they couldn't. That's your terminology. They didn't.*
>
> *Didn't. And, therefore, they didn't pay the $1.7 million - - -?---That's correct.*
>
> *- - - purchase price. But nor could they pay to you the statutory demand amount of $45,000 within 21 days of the statutory demand?---Well, I don't know. Again, that's your terminology, not mine. I believe they could've paid it but they did not."*[58]

[82] Therefore, having had regard to the accumulation of all relevant events as they unfolded at the time, I am not satisfied that the defendant using the information reasonably available to her and making the analysis of that information which a reasonable person would have made, would have had reasonable grounds to suspect the Company's insolvency.

[83] Further, there is nothing about the evidence of the defendant that would have given a reasonable business person in her circumstances any cause to have believed, understood or interpreted any of the circumstances surrounding the making of the Demand Debt Payment any differently than she did. There was nothing to give rise to a positive feeling or apprehension of distrust.

[84] The second transaction that needs to be considered is the Rent Debt Payment on 4 November 2014. The only additional circumstances to those prevailing at the time of the Demand Debt Payment approximately three weeks earlier, were that it and the Costs Payment had each been paid by the Company in full and on time. Further, the Deposit Payment and the Rent Debt Payment were paid by the Company a day earlier than had been agreed. The position is if anything, less suggestive of insolvency at this later time.

Good faith

[85] The concept of good faith concerns the subject state of mind of the defendant acting with propriety and honesty at the time each of the payments were received.[59] The defendant bears the onus of proof. It is free from any objective element.[60] It is not confined to an examination of whether or not insolvency was in view when the payments were made.

[86] Having observed and heard the defendant give her evidence, I have no reason to doubt her bona fides. For the reasons detailed above, I am persuaded there were

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[58] T1-61, ln 16-40.
[59] *Olifent v Australian Wine Industries Pty Ltd* (1996) 130 FLR 195; *Cussen v Sultan* (2009) 27 ACLC 1650.
[60] *Downey v Aria Pty Ltd* (1996) ACLC 1068 per Ashley J at p 1075.

no reasonable grounds for her to have suspected that she would be preferred to other creditors as a consequence of the Company paying the outstanding amounts it owed to her. The defendant's evidence raises no other questions as to her honesty and propriety.

[87] Therefore, the defendant has established that both the Demand Debt Payment and the Rent Debt Payment were made in good faith. I am also satisfied that the Costs Payment and Deposit Payment were also made in good faith if such a finding is required. It was not suggested to the defendant in cross examination that there was any element of impropriety or dishonesty in her acceptance of any of these payments. Each of the four payments were received in respect of legitimate existing debts.

Valuable consideration

[88] The defendant is required to establish that real or substantial consideration was provided, or that the defendant changed its position in reliance on the transaction.[61]

[89] In consideration for the making of the Demand Debt Payment (and the Costs Payment), the defendant's winding up proceedings were to be brought to an end pursuant to clause 1.2 of the Deed. In consideration for the promise of the Company to make the Rent Debt Payment, pursuant to clause 3.1 of the Deed, the defendant agreed to release and discharge the Company. In consideration for the promise to make the Deposit Payment, the defendant granted the Company an equitable interest in the Property by entering into the October 2014 Contract.

Conclusion

[90] In short, I am satisfied that the defendant has established under s 588FG(2) that her receipt of the Demand Debt Payment and the Rent Debt Payment from the Company on 14 October 2014 and 3 November 2014 respectively were not voidable transactions under Ch 5 Pt 5.7B, Div 2 of the Act. The Liquidator's claim is dismissed.

Costs

[91] The starting point is r 681 of the UCPR, which provides that costs of a proceeding are in the discretion of the court, but follow the event, unless the court orders otherwise. Counsels for the Liquidator and the defendant addressed the issue of costs at the conclusion of the oral submissions on 27 February 2019. It is not in dispute that costs of the proceeding ought to follow the event. I make this order.

[92] There is an outstanding issue of reserved costs from an application heard before another judge on 14 March 2018. In the application the Liquidator applied for an order that the defendant's signature on the request for the trial date be dispensed with. Counsel for the defendant did not appear at this application. The order on the court file reveals that the Liquidator was successful. Directions were also made for the future conduct of the matter. Given that these further directions were made at the time of this earlier application together with the outcome of this proceeding,

[61] *Barton v Official Receiver* (1986) 161 CLR.

I am of the view that it is appropriate that each party bear their own costs of the application.