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Voidable Transactions: Featherstone v Ashala Model Agency Pty Ltd

A recent Court of Appeal decision confirms that in the right circumstances a transaction can be found uncommercial, even if it is in satisfaction of a company's liability.

In a recent decision the Supreme Court of Queensland Court of Appeal upheld an earlier decision in which it was held that payments made by a company for the benefit of its shadow director were voidable as uncommercial transactions, and payments made for the purpose of defeating, delaying or interfering with creditors.

The facts

In *Featherstone v Ashala Model Agency Pty Ltd (in liq)* [2017] QCA 260 a lease agreement was entered into by Ashala Model Agency Pty Ltd (In Liquidation) (Company) and its shadow director - who was found to be the effective sole owner and controller of the Company. Pursuant to a separate agreement entered into by the parties at the same time, rent was not payable until a request was made by the issuing of an invoice to the Company for payment of rent.

Rent was initially not requested or paid pursuant to the lease. Approximately two years into the lease, the shadow director arranged for the Company to pay amounts totalling \$460,000 in settlement of rent owing under the lease. The amounts paid by the Company were used to buy a property. The property was initially registered in the name of the shadow director's de facto partner after the purchase and later

transferred to the shadow director. The Company was then wound down and a new company also named Ashala commenced trading.

The Company was insolvent either prior to, or as a result of, the payments made by the Company with no tax returns or business activity statements having been lodged and significant taxation liabilities owing. The Company was eventually wound up and the Liquidator commenced proceedings alleging that the payments were uncommercial transactions, and made for the purpose of defeating, delaying or interfering with creditors.

The Supreme Court decision

The Supreme Court found that although the payments were in

satisfaction of the Company's liability for rent, the shadow director was aware that making the payments meant he would be paid preferentially, leaving other creditors unpaid with the Company winding down.

The Court concluded that a reasonable person would not have made the payments in those circumstances and the payments constitute uncommercial transactions under section 588FC of the Corporations Act 2001 (Cth) (Act).

The Court also found that the payments were voidable on the basis that one of the shadow director's purposes in causing the payments to be made was to defeat, delay or interfere with creditors. This was held to be the case given that:





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- the shadow director was aware the Company had not met its tax liabilities;
- the shadow director had set up the Company to outwardly appear to be controlled and owned by others when it was really owned and controlled by him; and
- another Ashala company was to become involved in conducting the business.

The Court ordered pursuant to section 588FF(1)(d) of the Act that the property purchased with the monies paid by the Company be transferred to the Liquidator.

The shadow director then appealed the decision on various grounds.

The Court of Appeal decision

In its decision handed down on 3 November 2017, a 2-1 majority of the Court of Appeal dismissed the shadow director's appeal, agreeing that the payments are voidable for the reasons identified by the Court at first instance.

While the majority agreed with the Court's first instance decision, in a dissenting judgment, McMurdo JA held that the payments were not uncommercial transactions, or made for the purpose of defeating, delaying or interfering with creditors.

McMurdo JA considered the payments not to be uncommercial because the agreements between the Company and shadow director in respect of rent were legally

enforceable and the Company's entitlement to occupy the leased premises depended on the payments being made.

The payments therefore had a commercial explanation. McMurdo JA also held that the purpose of the payments was to discharge a debt that was owing, and attributing the shadow director's purpose to the Company, to pay the purchase price for the property. Those purposes did not include to defeat, delay or interfere with the rights of creditors.

Comment

The case is a good example of the Act's voidable transaction provisions being used to recover a significant amount of money transferred out of a company by a director in the context of phoenix activity.

The decision also confirms that in the right circumstances a transaction can be found to be uncommercial even if it is in satisfaction of a liability the company has.

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