HIGH COURT OF AUSTRALIA

11 September 2024

JOHN MAXWELL MORGAN & ORS v MCMILLAN INVESTMENT HOLDINGS PTY LTD & ANOR
[2024] HCA 33

Today, the High Court dismissed an appeal from a decision of the Full Court of the Federal Court of Australia. The appeal concerned a requirement under s 579E(1) of the *Corporations Act 2001* (Cth) for the making of a "pooling order" in relation to two or more companies. Section 579E(1) provides for a number of gateways before a court can consider whether it is satisfied that it is just and equitable to make a pooling order. The gateway in s 579E(1)(b)(iv) requires that "one or more companies in the group own particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group".

The first appellant (Mr Morgan) is the liquidator of the second and third appellants ("SAP" and "SAM"), two companies that operated a colour printing business. Under a finance facility between SAP, SAM and the first respondent ("MIH"), a receiver and manager was appointed to SAP and SAM. The receiver, SAP and SAM entered an agreement to sell, as a going concern, the assets and business operated by SAP and SAM to a purchaser. Correspondence from MIH's lawyer suggested that a much stronger offer had been made by the purchaser, but that the purchase price was reduced at the last minute. Mr Morgan also tendered an invoice from a company associated with MIH to the purchaser for $330,000. Mr Morgan alleged the invoice represented a payment that would otherwise have been included in the purchase price due to SAP and SAM. On 10 June 2018, ASIC deregistered SAM.

The primary judge reinstated SAM and made a pooling order in respect of SAP and SAM. The primary judge held that the gateway in s 579E(1)(b)(iv) permitted the making of the order. The primary judge held that the "particular property", owned jointly and severally by SAP and SAM, was a chose in action to seek recovery of the monies alleged to have been wrongfully paid, that would be able to be used in connection with their joint undertaking to "discharge their debts and conduct recovery of their assets". A majority of the Full Court allowed an appeal and held that s 579E(1)(b)(iv) required the relevant property to be used with respect to a past or present joint undertaking, not a future joint undertaking to enforce debts.

The High Court held that whether "use" of property will satisfy the requirement in s 579E(1)(b)(iv) will depend in every case upon whether the identified use has a sufficient "connection" with the carrying on of a joint business, scheme or undertaking. Even if the alleged chose in action was property available for use, it would not have sufficient connection with the "carrying on" of the joint business that was sold. It would, rather, have a direct and substantial connection with the disposal of the business. The High Court also held that s 601AH(5) of the *Corporations Act*, which provides that "[i]f a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered", only had the limited effect of deeming SAM to have continued to exist. It does not affect the fact that no business, scheme or undertaking took place during that period of deemed existence.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.

Please direct enquiries to Ben Wickham, Executive Registrar & Head of Public Affairs
Telephone: (02) 6270 6893 Fax: (02) 6270 6868
Email: enquiries@hcourt.gov.au Website: www.hcourt.gov.au