IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S ECI 2022 03446

IN THE MATTER of ELIANA CONSTRUCTION AND DEVELOPING GROUP PTY LTD (ACN 132 817 362) (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)

BETWEEN:

CRAIG IVOR BOLWELL in his capacity as liquidator of ROCK DEVELOPMENT & INVESTMENTS PTY LTD (ACN 168 484 811) (IN LIQUIDATION) — Plaintiff

v

ANTHONY ROBERT CANT in his capacity as liquidator of ELIANA CONSTRUCTION AND DEVELOPING GROUP PTY LTD (ACN 132 817 362) (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) — Defendant

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JUDGE:	Hetyey AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	9 February 2023
DATE OF JUDGMENT:	2 November 2023 (revised 1 December 2023)
CASE MAY BE CITED AS:	Re Eliana Construction and Developing Group Pty Ltd (in liq) (recs & mgrs apptd)
MEDIUM NEUTRAL CITATION:	[2023] VSC 639

CORPORATIONS — Winding up — Proof of debt — *Corporations Act 2001* (Cth) ('*Corporations Act*') — Section 90-15 (Schedule 2, Insolvency Practice Schedule (Corporations)) — *Corporations Regulations 2001* (Cth) — Reg 5.6.54 — Appeal against liquidator's rejection of proof of debt — Role of Court — Whether debt claimed a true liability of the company and enforceable according to law — Where payment made by purported creditor under deed of guarantee and indemnity towards taxation liabilities of related company — Where purported creditor seeks to subrogate to rights of Commissioner of Taxation as priority creditor under s 556(1)(e) of the *Corporations Act* — Whether terms of deed prevent purported creditor from subrogating and proving in liquidation of company — Rule against double proofs — Matter of substance not of form.

EQUITY — Where payment by guarantor of taxation liabilities of related company — Equitable subrogation — Whether payment voluntary or required by law — Whether excluded by terms of deed — Where certain guaranteed liabilities remain outstanding — Whether unconscionable to deny subrogation — Whether subrogation would affect rights of another party to deed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms C Pulverman, solicitor	Wisewould Mahony (to 2 May 2023) FCW Lawyers (from 2 May 2023)
For the Defendant	Ms R Zambelli	White Cleland Pty Ltd

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HIS HONOUR:

Introduction and background

1 By originating process filed on 5 September 2022, Mr Craig Ivor Bolwell ('**plaintiff**'), in his capacity as liquidator of Rock Development & Investments Pty Ltd (in liq) ('**Rock**'), brings an appeal under reg 5.6.54 of the *Corporations Regulations 2001* (Cth) ('**Regulations**'), r 14.1 of the *Supreme Court (Corporations) Rules 2013* (Vic), s 90-15 of *the Insolvency Practice Schedule (Corporations)* ('**IPS**'), and the inherent jurisdiction of the Court in respect of the decision by Mr Anthony Robert Cant ('**defendant**'), as liquidator of Eliana Construction and Developing Group Pty Ltd (in liq) (recs & mgrs apptd) ('**Eliana**') to reject Rock's proof of debt.

2 Eliana and Rock are related companies on account of the fact that Mr Magdy Sowiha was the sole director and secretary of both entities. Eliana operated as a construction and property development business in Preston, Victoria. Rock was formerly the registered proprietor of a property located at 44–46 Bond Street, Ringwood[1] ('**Bond Street Property**').

The Deed

3 On 5 April 2016, a Deed of Agreement, Guarantee and Indemnity ('**Deed**') was entered into between the Commonwealth of Australia, as represented by the Commissioner of Taxation ('**Commissioner**'), Eliana, Mr Sowiha and Rock. In summary, the Deed concerned a payment arrangement for taxation debts ('**Total Taxation Debt**') owed by Eliana and Mr Sowiha (together, '**Taxpayers**'). In support of the obligations of Eliana and Mr Sowiha, Mr Sowiha and Rock provided a guarantee and indemnity to the Commissioner for the Total Taxation Debt. Rock provided the Bond Street Property as security for compliance of the obligations of Eliana and Mr Sowiha under the Deed and executed a second-ranking mortgage in favour of the Commissioner on 5 April 2016.[2] The Commissioner then caused a caveat to be lodged on the Bond Street Property accordingly ('**caveat**').

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1 More particularly described in Volume 11532 Folio 068, Lots 95 and 96 on Plan of Subdivision 016985.

2 The plaintiff submitted at the hearing that the mortgage was never registered and was properly characterised as an equitable mortgage.

4 The operation of the Deed is a significant issue in the proceeding. I will return to the key provisions of the Deed shortly.

Relevant insolvency events

5 On 11 October 2016, Eliana went into voluntary administration and Mr John Stuart Potts and the defendant were appointed as the company's administrators pursuant to s 436A of the *Corporations Act 2001* (Cth) ('***Corporations Act***'). On 3 November 2016, Eliana was placed into a creditors' voluntary liquidation and the defendant and Mr Potts were appointed joint and several liquidators. Mr Potts resigned as liquidator on 29 November 2017 and the defendant became the sole liquidator of the company.

6 On 28 July 2017, Rock was wound up in insolvency by order of Registrar Luxton of the Federal Court of Australia and Ms Karen Leanne Kelson and the plaintiff were appointed as joint and several liquidators. At some point (the precise date is unclear on the evidence), Mr Nick Combis and Ms Louisa Sijabat were appointed receivers and managers of Rock ('**receivers and managers**'). On 19 February 2020, Ms Kelson ceased to be a liquidator of Rock. From this time, the plaintiff was the sole liquidator of the company.

7 According to a report to creditors of Eliana dated 2 February 2018, Mr Sowiha became bankrupt on an unspecified date.

Sale of Bond Street Property

8 The Bond Street Property was ultimately sold by Rock's receivers and managers and settlement occurred on 9 February 2017. On 13 February 2017, the solicitors of Rock's receivers and managers effected a payment of $1,361,248.76 to the Australian Taxation Office ('**ATO**') from the net sale proceeds of the Bond Street Property ('**sale proceeds**'). The sale proceeds were applied by the ATO against a running balance account ('**RBA**') and then allocated by the ATO to satisfy a superannuation guarantee charge ('**SGC**') liability of $1,278,465.83 then owed by Eliana. The allocation by the ATO of the sale proceeds to the company's SGC liability was confirmed in a report to creditors of Eliana dated 13 July 2022 and issued by the defendant.

9 On 30 September 2019, the plaintiff and Rock issued proceedings against the Commissioner under ss 588FA, 588FB, 588FC, 588FE and 588FF of the *Corporations Act* in respect of the sale proceeds ('**voidable transaction proceeding**'). The application characterised the payment to the Commissioner of the sale proceeds as an uncommercial transaction and alleged a separate payment of $31,945.81 to be an unfair preference.

10 On 27 May 2020, Gardiner AsJ ordered by consent that, pursuant to s 588FF(1) of the *Corporations Act*, the Commissioner pay to Rock the sum of $550,000.00, in respect of the claims made in the voidable transaction proceeding, together with interest and legal costs ('**s 588FF orders**'). The Commissioner made the relevant payment on 23 June 2020. The Court was informed by the plaintiff's solicitor at the hearing of the present proceeding that no settlement deed or agreement was entered into between Eliana, the plaintiff and the Commissioner as a precursor to the s 588F orders.

Proofs of debt

11 On 31 October 2016, the Deputy Commissioner of Taxation ('**Deputy Commissioner**'), on behalf of the Commissioner, lodged a proof of debt in the liquidation of Eliana in the sum of $4,369,279.78, including for income tax of $42,506.08 for the financial year ended 30 June 2016; an RBA deficit debt of $3,066,478.39 as at 10 October 2016; and an SGC debt in the sum of $1,260,294.41 for the period 1 July 2013 to 30 June 2016 ('**Commissioner's initial proof of debt**'). On 11 April 2018, more than a year after the sale of the Bond Street Property and the payment to the ATO of the sale proceeds, the Deputy Commissioner lodged a further proof of debt in the amount of $2,545,412.30, in respect of income tax and RBA deficit debts ('**Commissioner's further proof of debt**'). No claim was made in respect of any outstanding SGC debts by Eliana. An SGC ledger for Eliana that accompanied the Commissioner's further proof of debt records a credit in the sum of $1,278,465.85 received on 13 February 2017, described as: 'partial payment transferred in from Integrated client account'.

12 By letter dated 25 March 2019, the plaintiff, on behalf of Rock, lodged a proof of debt in the liquidation of Eliana in the sum of $4,933,668.71. This was replaced by a

subsequent proof of debt lodged under cover of letter dated 29 March 2019, which rectified a typographical error in the earlier document ('**proof of debt**'). The proof of debt comprised an:

(a) Integrated Client Account as at 11 October 2016 in the sum of $3,068,681.03, which represented the RBA debt owed by Eliana to the Commissioner, and which Rock had guaranteed under the Deed;

(b) amount of $1,278,465.83, which represented most of the sale proceeds paid by Rock's receivers and managers to the ATO in satisfaction of amounts owed by Eliana in relation to SGC obligations. This amount was claimed as a priority debt pursuant to ss 556(1)(e), 560 and 561 of the *Corporations Act*; and

(c) amount of $586,521.85, comprising $82,782.93 advanced to the ATO as part of the sale proceeds representing an unsecured RBA debt balance, plus $503,738.92 in relation to an alleged unsecured loan amount.

13 An RBA statement enclosed with the proof of debt noted that on 13 February 2017, the sale proceeds were applied by the ATO against Eliana's assessed SGC obligations, existing RBA and an unsecured debt.

14 On 24 April 2019, the defendant issued a notice of rejection, by which he partially accepted the proof of debt ('**initial adjudication**'). The proof of debt was admitted in the sum of $4,347,146.86, including a priority amount of $1,278,465.83. It was disallowed in the sum of $568,521.85, which pertained to the loan account debt for reasons that included an alleged alteration of Eliana's books after the defendant's appointment.

15 The plaintiff did not formally appeal the initial adjudication, although he wrote to the defendant on 10 May 2019 requesting the defendant reconsider his decision to disallow the loan account debt and disagreeing with the suggestion the company's books and records were altered and inaccurate. The defendant deposes that he did not respond to the invitation to reconsider the initial adjudication because he did not

receive that correspondence. In any event, the defendant says he was not in a position to reconsider the proof of debt at that time because, among other things, there were insufficient funds in the liquidation to pay any dividend to creditors.

On 7 December 2021, the Deputy Commissioner submitted a revised proof of debt totalling $3,110,881.49 on behalf of the Commissioner ('**Commissioner's revised proof of debt**'), which replaced the Commissioner's proof lodged on 11 April 2018. The Commissioner's revised proof of debt comprises the outstanding amount of $2,541,990.18 in respect of RBA deficit debts and $3,422.12 for income tax, together with the sum of $565,469.19 as an SGC debt owed by Eliana.

Subsequent rejection of proof of debt

16 By circular dated 13 July 2022, the defendant convened a meeting of creditors of Eliana to be held on 2 August 2022. The purpose of the meeting was to seek creditors' approval to enter a deed of settlement of a claim in debt brought by Eliana against two individuals ('**proposed settlement**') pursuant to s 477(2A) of the *Corporations Act*.

17 In a report to creditors which accompanied the 13 July 2022 circular, the defendant stated he did not anticipate a dividend would be paid to unsecured creditors 'given the magnitude of secured creditor claims and priority creditor claims in the liquidation and the limited asset position of [Eliana]' (approximately $3.2 million was claimed by one secured creditor and there was a Fair Entitlements Guarantee employee priority claim of $640,452.00).

18 On 1 August 2022, a representative of the plaintiff sent an appointment of proxy form to the defendant, together with an accompanying email, which confirmed the plaintiff would vote against the proposed settlement. The email drew attention to the fact that the documentation provided to creditors did not record that the defendant had partially admitted the proof of debt in the initial adjudication. The defendant has given evidence that he attempted to telephone the plaintiff to discuss the plaintiff's position and left a voicemail message. The defendant then sent an email and SMS requesting that the plaintiff return his call, which did not occur.

19 The minutes of the meeting of creditors held on 2 August 2022 record that whilst Rock's proof of debt had been admitted at the meeting in the amount of $4,347,146.00 (in line with the initial adjudication), it was also objected to by the defendant pursuant to s 75-100(3) of the *Insolvency Practice Rules (Corporations) 2016* (Cth) ('**Practice Rules**') for voting purposes. In light of the objection, the defendant determined pursuant to s 75-140 of the Practice Rules to adjourn the meeting to 22 August 2022 to obtain legal advice in relation to Rock's proof of debt.

20 Following the receipt of such legal advice, on 22 August 2022, the defendant sent a letter and notice of rejection to the plaintiff, which revoked the initial adjudication pursuant to reg 5.6.55 of the Regulations on the basis that the components of the proof of debt that were previously admitted were no longer provable in Eliana's liquidation ('**later adjudication**').

21 In the accompanying letter, the defendant explained that since the initial adjudication, he had received the Commissioner's revised proof of debt, which included an amended priority claim for SGC in the sum of $565,469.19. Because Rock's proof of debt had ultimately been rejected in full, it was unnecessary to consider whether its claim attracted priority pursuant to s 556(1)(e) of the *Corporations Act*. The defendant did not consider statutory subrogation under s 560 of the legislation was available because Rock, as a third party, had paid an employee-related liability directly to Eliana's creditor (as opposed to advancing the money via Eliana).[3] Further, the defendant considered that equitable subrogation by the plaintiff into the rights of the Commissioner was not possible because there had only been partial satisfaction of the guaranteed liability.[4]

22 In his notice of rejection, the defendant listed his grounds for disallowing the components of the proof of debt as follows:

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3 Citing *Re Dalma No 1 Pty Ltd (in liq)* (2013) 95 ACSR 641 (Brereton J) ('***Re Dalma***').

4 Citing *Re Dalma*; *Westpac Banking Corporation v Gollin & Co Ltd (in liq)* [1998] VR 397 (Tadgell J) ('***Westpac Banking v Gollin***').

(a) in respect of the Integrated Client Account Debt of $3,068,681.03, which had already been rejected, the defendant:

(i) asserted that pursuant to the rule against double proofs, a guarantor cannot prove for the amount paid by it until the principal creditor receives repayment of the entirety of the principal debt;[5]

(ii) noted that in a letter accompanying the proof of debt, the plaintiff's lawyers stated that $82,782.93 from the sale proceeds was paid towards Eliana's RBA and the Commissioner's revised proof of debt included an amount of $2,541,990.18. Therefore, Rock had not discharged Eliana's entire debt and is prohibited from proving as a creditor in the liquidation of Eliana; and

(iii) clause 7.5 of the Deed encapsulates the rule against double proofs and otherwise precludes Rock from proving a claim in the liquidation of Eliana until all amounts in connection with the Deed and owing by Eliana are paid.

(b) in respect of the priority amount for SGC of $1,278,465.83, which had previously been accepted, the defendant:

(i) asserted that the rule against double proofs prevents Rock from claiming in the liquidation for the SGC amount because the Commissioner's revised proof of debt claimed $565,469.86[6] in respect of outstanding SGC owing by Eliana; and

(ii) contended that clause 7.5 of the Deed prevents Rock from being able to prove in the liquidation or exercise any right to vote.

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5 Citing *Seabird Corporation (in liq) v Sherlock* (1990) 2 ACSR 111; *Re Octaviar Ltd (No 8)* (2009) 73 ACSR 139, 162–9 [75]–[89] (McMurdo J) ('***Re Octaviar***').

6 As previously noted, the Commissioner's revised proof of debt actually specifies $565,469.19 in respect of SGC.

(c) as regards the loan account and unsecured balance of the RBA Debt in the sum of $586,521.85, the defendant repeated the grounds for disallowance of this aspect of the claim already given in the initial adjudication.

Creditors' meeting on 22 August 2022

23 At the adjourned meeting of creditors on 22 August 2022, the defendant noted the Commissioner's revised proof of debt had been admitted in full for voting purposes. The creditors were also notified that whilst Rock's proof of debt had been partially admitted in the initial adjudication, following the receipt of legal advice, the defendant had rejected the proof of debt in full.

Relevant provisions of Deed

24 As previously noted, the Deed was entered into by Rock and Mr Sowiha in their capacities as 'Taxpayers' and the 'Guarantors' (collectively, '**Obligors**') and the Commissioner. The recitals to the Deed specify various matters, including that Rock agreed to guarantee Taxation Debt A (being the amounts that Eliana was indebted to the Commissioner) and Taxation Debt B (being the amounts that Mr Sowiha was indebted to the Commissioner) and would provide securities accordingly.

25 'Taxation Debt A' is defined to comprise a 'Tax-Related Liability', including an uncharacterised amount of $2,881,863.14 payable by Eliana as at 22 March 2016 and accruing General Interest Charge ('**GIC**'); quarterly business activity statements ('**BAS**') for the period 1 October 2015 to 31 December 2015; monthly Instalment Activity Statement amounts for another Tax-Related Liability (possibly for PAYG withholding tax amounts) throughout January and February 2016; and the amount of any additional GIC, which accrues on or after 22 March 2016. 'Taxation Debt B' comprises various 'Tax-Related Liability' owing by Mr Sowiha, including $575,247.43 owing as at 22 March 2016 for monthly BAS and GIC.

26 The term 'Tax-Related Liability' is defined in s 255-1 of the *Taxation Administration Act 1953* (Cth) ('**TAA**') to mean a pecuniary liability to the Commonwealth arising directly under a 'taxation law', which is defined in s 995.1 of the *Income Tax Assessment Act 1997* (Cth) ('**ITAA97**') to include an Act in respect of which the Commissioner has

general administration. Such legislation relevantly includes: the *Income Tax Assessment Act 1936* (Cth) ('**ITAA36**') and the ITAA97 (in respect of RBA deficit debts and income tax); the TAA (in respect of GIC); and the *Superannuation Guarantee (Administration) Act 1992* (Cth) ('**SGAA 1992**') (in respect of SGC).

27 The Deed, each 'Security' granted under it, and any document required to give effect to the provisions of the Deed or the relevant securities, or which the parties agree is a Transaction Document, are collectively defined by the instrument as 'Transaction Documents'. 'Securities' are, in turn, relevantly defined to mean 'the registered mortgage detailed in Items 1 and 2 of Schedule 1 to the Deed, ranking as second-registered mortgages'. Items 1 and 2 of Schedule 1 specify mortgages granted by Mr Sowiha over certain properties in Doncaster, Victoria.

28 Relevantly, under cl 4.1, the Taxpayers agreed to (among other things):

(a) pay the 'Total Taxation Debt' (which is defined as the combined totals of Taxation Debt A and Taxation Debt B) by way of consecutive monthly payments of $115,000;

(b) assume liability for each other's outstanding Tax-Related Liabilities, such that they will be jointly and severally liable for the Total Taxation Debt; and

(c) 'comply with their current and future tax obligations under the [ITAA36, ITAA97, TAA] or otherwise'.

29 By cl 6.1 of the Deed, Rock irrevocably and unconditionally agreed to assume liability for, and guaranteed to the Commissioner payment of, the full amount of the Total Taxation Debt and, in the event the Taxpayers do not pay any amount falling due under or in connection with any Transaction Document (including the Deed itself), to immediately, on demand, pay that amount as if it were the principal Taxpayer. Under cl 3.1, the Guarantors (which include Rock) granted to the Commissioner the Securities by executing the Securities to operate as a second ranking

mortgage over the 'Property'. The term 'Property' means the properties detailed in Items 3 and 4 of Schedule 1. Item 4 of Schedule 1 is the Bond Street Property.

30 I pause here to note that there appears to be a disconformity between the operation of cl 3.1, the definitions of Securities and Property, and the reference to certain Securities and Properties in Schedule 1. The effect of this inconsistency is that despite cl 3.1 and the recitals to the Deed contemplating that both Mr Sowiha and Rock, as Guarantors of Eliana, will provide Securities over the Property, the Securities are only defined to include Mr Sowiha's properties and not the Bond Street Property then owned by Rock. However, the obligation to grant the Securities in cl 3.1 purports to extend to the Property, which, by reference to Schedule 1, means the Bond Street Property. In any event, it is not disputed that Rock executed a second ranking mortgage over the Bond Street Property in favour of the Commissioner on 5 April 2016.

31 Clause 7.2, which is titled 'Reinstatement', states:

> If any payment to, or any discharge given by, the Commissioner (whether in respect of the obligations of any Taxpayer or any security for those obligations or otherwise) is avoided or reduced for any reason (including, without limitation, as a result of insolvency, breach of fiduciary or statutory duties or similar event):
>
> (a) the liability of the Guarantors shall continue as if the payment, discharge, avoidance or reduction had not occurred; and
>
> (b) the Commissioner shall be entitled to recover the value or amount of that security or payment from the Guarantors, as if the payment, discharge, avoidance or reduction had not occurred.

32 Importantly, cl 7.5 of the Deed, which is titled 'Deferral of Guarantors' rights', provides:

> Until all amounts which may be, or become, payable by all Obligors under, or in connection with, the Transaction Documents, have been irrevocably paid in full, and unless the Commissioner otherwise directs, the Guarantors must not:
>
> (a) exercise any rights which they may have, by reason of performance by them of their obligations under the Transaction Documents:
>
> (i) to be indemnified by any Taxpayer;
>
> (ii) to claim any contribution from any other guarantor of, or provider of, security for any Taxpayers' obligations under the Transaction Documents; and/or

(iii) to take the benefit (in whole or in part and whether by way of subrogation or otherwise) of any rights of the Commissioner under the Transaction Documents, or of any other guarantee or security taken pursuant to, or in connection with, the Transaction Documents by the Commission; or

(b) in any form of administration of any Taxpayer's affairs (including liquidation, winding up, voluntary administration, dissolution or receivership or any analogous process) prove for or claim, or exercise any vote or other rights in respect of, any indebtedness of any nature owed to them by that Taxpayer.

33 Under cl 9.3, the Obligors acknowledge that if the Taxpayers default in the performance of their obligations under the Deed, the Commissioner is authorised to take 'whatever action is necessary to recover the full amount outstanding by the Taxpayers in respect of the Total Taxation Debt'. An event of default is specified in cl 13.1 to include circumstances where: a payment due under the Deed is not made on the date stipulated; there is a failure by the Taxpayers to lodge and pay the liabilities associated with any taxation return or BAS by the due date for such lodgement or payment where that due date falls after the execution of the Deed; or an 'Insolvency Event' occurs in respect of an Obligor. An Insolvency Event is defined to include the winding up of Eliana or Rock.

34 Clause 10 contemplates that at any time while any part of the Total Taxation Debt remains outstanding, the Guarantors may approach the Commissioner to seek the substitution of the Securities given under the Deed. The decision whether to substitute the Securities is at the absolute discretion of the Commissioner.

35 Clause 12 notes that the Commissioner may allocate payments from an Obligor, whether made throughout the operation of the Deed, or upon the enforcement of the Securities, 'in whichever manner he considers appropriate'. Further, any allocation made by the Commissioner will override any allocation by an Obligor.

Procedural history

36 The first return of the matter was on 7 October 2022, at which time the Court made timetabling orders, including for the filing of affidavits and submissions and the referral of the matter to mediation prior to the final hearing of the matter on 9 February

2023.[7] On 24 January 2023, pursuant to the Court's order of 13 January 2023, the plaintiff filed an amended originating process seeking:

(a) to set aside the defendant's later adjudication on 22 August 2022 of Rock's proof of debt;

(b) that the proof of debt be admitted for the revised amount of $728,465.83 (instead of $4,933,668.71) as a priority debt in respect of SGC amounts owed by Eliana to the Commissioner pursuant to equitable subrogation and under s 556(1)(e) of the *Corporations Act* ('**SGC priority amount**'); and

(c) the costs of the appeal.

37 According to the plaintiff's written submissions, the decision to amend the originating process and narrow the scope of the appeal came about following a further consideration of the components of the proof of debt and the likelihood, based on the defendant's advice, of little return to unsecured creditors. In effect, the plaintiff no longer pursues the appeal in respect of the defendant's rejection of the unsecured debts (being the Integrated Client Account debt of $3,068,681.03 and the loan account and unsecured balance of the RBA debt of $586,521.85). Instead, the plaintiff has elected to focus solely on the SGC priority amount of $728,465.83, which represents the difference between the $1,278,465.83 paid under the sale proceeds to the Commissioner and the $550,000.00 paid by the Commissioner to Rock in the voidable transaction proceeding. Relying on the principles of equitable subrogation, Rock seeks to step into the shoes of the Commissioner as a priority creditor in the liquidation of Eliana under s 556(1)(e) of the *Corporations Act*.

38 The plaintiff relies upon the affidavits and exhibits of Catherine Pulverman sworn on 5 September 2022 and 7 October 2022, respectively, in addition to written submissions dated 30 January 2023. In opposing the appeal, the defendant relies upon the affidavits of Anthony Robert Cant sworn on 17 October 2022 and 30 January 2023,

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[7] In addition, on 5 October 2022, Connock J referred the matter for hearing and determination to an Associate Judge pursuant to r 77.05 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) and, if required, also pursuant to r 16.1(3) of the *Supreme Court (Corporations) Rules 2013* (Vic).

respectively, the affidavit of Gareth Vaughan Brodie sworn on 7 February 2023 and written submissions dated 7 February 2023.

Questions raised on appeal

39 At the conclusion of the hearing on 9 February 2023, I requested the parties to prepare a joint list of questions for determination, having regard to the manner in which the application was argued at hearing and the breadth of issues before the Court. On 7 March 2023, the parties provided a joint statement of questions to the Court. The five-page document contained 16 cascading questions, which can be distilled as follows:

(a) what is the nature of the appeal brought by the plaintiff against the defendant's later adjudication, rejecting the proof of debt, and the Court's role in determining the appeal?;

(b) do the amounts claimed in the Deputy Commissioner's revised proof of debt for:

(i) income tax amounts as at 3 November 2016; and/or

(ii) an RBA deficit in respect of BAS amounts as at 3 November 2016;

constitute, in whole or in part, a Tax-Related Liability and/or accrued GIC forming part of Taxation Debt A or Taxation Debt B (as defined in the Deed)?;

(c) if so, are they amounts payable by Eliana and Mr Sowiha, as Taxpayers, and/or Rock, as a Guarantor, under or in connection with the Deed, which have not been paid and remain outstanding and payable to the Commissioner?;

(d) if so, is Rock as Guarantor prohibited from:

(i) subrogating to the rights of the Commissioner under the Deed (and other Transaction Documents) in relation to any amounts it has paid towards the satisfaction of Eliana's debts by operation of cl 7.5(a)(iii) of the Deed; and/or

(ii) proving in the liquidation of Eliana or otherwise exercising any vote or other rights in respect of any indebtedness of any nature owed to it by Eliana by operation of cl 7.5(b) of the Deed?

(e) if the answers to (b), (c) and (d) are 'no', do the amounts owed by Eliana to the Commissioner in relation to SGC, claimed in the Commissioner's revised proof of debt, constitute, in whole or in part, a Tax-Related Liability and/or accrued GIC forming part of Taxation Debt A?;

(f) did the payment of $1,278,465.83 made by Rock to the ATO on 13 February 2017 have the effect of discharging the SGC debts owed by Eliana to the Commissioner and, if so, did the s 588FF orders of Gardiner AsJ made 27 May 2020 reinstate the $550,000 portion of that payment declared to be voidable?;

(g) do the principles of equitable subrogation permit Rock to prove in Eliana's liquidation for the sum of $728,465.83[8] as a priority creditor under s 556(1)(e) of the *Corporations Act*?; and

(h) does the rule against double proofs prevent Rock, as guarantor, from proving in Eliana's liquidation, in circumstances where the Commissioner's revised proof of debt claims:

(i) income tax amounts;

(ii) RBA deficit in respect of BAS amounts; and

(iii) SGC in the sum of $565,469.19,

and GIC and other Tax-Related Liabilities arising under the Deed?

40 In considering the appeal, I will refine these questions further and structure my reasons accordingly.

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8 Being the $1,278,465.83 payment made by Rock to the ATO on 13 February 2017 less the $550,000 received by Rock from the Commissioner pursuant to the orders of Gardiner AsJ made 27 May 2020.

Relevant statutory provisions and legal principles

Statutory provisions

41 The plaintiff's appeal is principally brought under reg 5.6.54 of the *Corporations Regulations*, which relevantly states:

> (1) Within 7 days after the liquidator has rejected all or part of a formal proof of debt or claim, the liquidator must:
>
> (a) notify the creditor of the grounds for that rejection in accordance with Form 537; and
>
> (b) give notice to the creditor at the same time:
>
> (i) that the creditor may appeal to the Court against the rejection within the time specified in the notice, being not less than 14 days after service of the notice, or such further period as the Court allows; and
>
> (ii) that unless the creditor appeals in accordance with subparagraph (i), the amount of his or her debt or claim will be assessed in accordance with the liquidator's endorsement on the creditor's proof.
>
> (2) A person may appeal against the rejection of a formal proof of debt or claim within:
>
> (a) the time specified in the notice of the grounds of rejection; or
>
> (b) if the Court allows—any further period.

42 Regulation 5.6.55(1) provides:

> If the liquidator considers that a proof of debt or claim has been wrongly admitted, the liquidator may:
>
> (a) revoke the decision to admit the proof and reject all of it; or
>
> (b) amend the decision to admit the proof by increasing or reducing the amount of the admitted debt or claim.

43 The plaintiff also relies on s 90-15 of the IPS, which allows the Court to 'make such orders as it thinks fit [including on the Court's own initiative] in relation to the external administration of a company'. According to s 90-15(3)(a), such orders may include 'an order determining any question arising in the external administration of the company'. Because s 90-15 is broad in its scope and contemplates the exercise of

judicial discretion and the determination of substantive rights,[9] it can be utilised by a person seeking to reverse or modify a liquidator's decision to reject a proof of debt. According to s 90-20(1)(a), 'a person with a financial interest in the external administration of the company' has standing to bring an application under s 90-15. A creditor, or putative creditor, whose proof of debt has been rejected by a liquidator undoubtedly has a financial interest in the liquidation and therefore standing to bring an application under s 90-15.[10]

Assessment by liquidator of proof of debt and nature of appeal

44 In determining whether a proof of debt should be admitted or rejected, a liquidator acts in a quasi-judicial capacity.[11] The liquidator must satisfy himself or herself there is an adequate basis to conclude the relevant debt exists to ensure the assets of the company are only distributed amongst true creditors of the company, with any surplus paid to contributories.[12] Where a person who claims to be a creditor is dissatisfied with the liquidator's decision to reject a proof of debt, the ordinary procedure is for the person to apply to the Court to reverse or modify that decision.

45 The principles concerning an appeal against a liquidator's decision to reject (or admit) a proof of debt are well-established and can be summarised as follows:

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9 *Re Polat Enterprises Pty Ltd (in liquidation)* [2020] VSC 485, [31] (Hetyey AsJ). See also Michael Murray and Jason Harris, *Keay's Insolvency: Personal & Corporate Law and Practice* (Lawbook, 11th ed, 2018) [10.335].

10 See *Re Capital Project Homes Pty Ltd* (1991) 6 ACSR 310, 311 (Young J); *Re Gordon Grant & Grant Pty Ltd (in liq)* (1982) 6 ACLR 727 ('***Re Gordon Grant***') (affirmed on appeal in *Ogilvie-Grant v East* [1983] 2 Qd R 314) (cases concerning the predecessor provision in s 1321(d) of the *Corporations Act*).

11 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332, 339 (Brennan and Dawson JJ) ('***Tanning Research Laboratories***'), citing *Re Britton & Millard Ltd* (1957) 107 LJ 601. See also *Re Menastar Finance Ltd* [2003] BCLC 338, [44] ('***Re Menastar***').

12 See *Tanning Research Laboratories*, 339; Andrew Key, *McPherson & Keay: The Law of Company Liquidation* (Sweet & Maxwell, 4th ed, 2018) [12-062] ('***McPherson & Keay: The Law of Company Liquidation***'), citing *Re Menastar*, [46]–[47].

(a) although referred to as an 'appeal' from the liquidator's decision, the application proceeds by way of a hearing *de novo*[13] and fresh evidence may be placed before the Court;[14]

(b) in the appeal, the liquidator relinquishes his/her quasi-judicial role and acts in an adversarial capacity by defending his/her decision and protecting the company's assets against the liability which is considered to be legally unenforceable.[15] In this way, the issue is contested between the putative creditor and the liquidator as a party litigant;[16]

(c) in responding to the appeal, the liquidator is permitted to raise defences that would have been available to the company had it not gone into liquidation and otherwise been sued by the creditor;[17]

(d) the critical question for the Court is whether the liability sought to be proved is a true liability of the company, enforceable against it according to law;[18]

(e) the Court must consider the merits of the creditor's claim and make a determination on the existence and amount of the debt.[19] In doing so, the Court

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13 *Tanning Research Laboratories*, 340–1, citing *Re Bird's Stores Ltd* (1931) 37 ALR 94 ('***Re Bird's Stores***'); *Re Kentwood Constructions Ltd* [1960] 2 All ER 655 ('***Re Kentwood***'); *Re Trepca Mines Ltd* [1960] 1 WLR 1273 ('***Re Trepca Mines***'). See also *Re Gordon Grant*, 318; *Ball v Jeremy Joseph Nipps as liquidator of Ochre Group Holdings (in liq)* [2023] WASC 348, [56] (Strk J) ('***Ochre Group Holdings***') and the additional authorities cited there; *Re Buildark Constructions Pty Ltd (in liq)* (2022) 68 VR 595, 602 (Gardiner AsJ).

14 *Re Bird's Stores*, 94–5; *Re Kentwood*, 656; *Westpac Banking Corp v Totterdell* (1997) 25 ACSR 769, 772 (Templeman J) (affirmed on appeal in *Westpac Banking Corporation v Totterdell* (1998) 20 WAR 150 (Ipp J, with whom Pidgeon and White JJ agreed) ('***Westpac v Totterdell***'); *Re Jay-O-Bees Pty Ltd (in liq)* (2004) 50 ACSR 565, 577–8 [60] (Campbell J) ('***Re Jay-O-Bees***'); *McPherson & Keay: The Law of Company Liquidation*, [12-066] and the cases cited there.

15 *Tanning Research Laboratories*, 341; *El-Saafin v Franek (No 3)* (2019) 143 ACSR 452, 463 (Lyons J) ('***El-Saafin***').

16 *Tanning Research Laboratories*, 341.

17 Ibid 341–2; *Macedonian Call Nominees Pty Ltd v A.M. Cornell (in his capacity as deed administrator of Go-Tell Nominees Pty Ltd) (subject to deed of company arrangement)* (Supreme Court of Victoria, Hansen J, 10 June 1998).

18 *Tanning Research Laboratories*, 339; *Re Young in his capacity as liquidator of Great Wall Resources Pty Ltd (in liq); Capocchiano v Young* [2013] NSWSC 879, [46] (Kunc J) ('***Capocchiano v Young***'); *El-Saafin*, 463; *Rimfire Constructions (Qld) Pty Ltd (in liq) v CRCG-Rimfire Pty Ltd* (2020) 4 QR 266, 273 (Martin J) ('***Rimfire Constructions***'); *5G Developments Pty Ltd (in liq) v Massie* [2021] FCA 791, [150] (Stewart J).

19 *KIS Realty Pty Ltd v Yeo and Rimbaldi* [2016] WASC 149, [1] (Master Sanderson) ('***KIS Realty***'); *Ochre Group Holdings*, [57], citing Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis, 17th ed, 2018) [27.441.15]. See also *McPherson & Keay: The Law of Company Liquidation*, [12-066], citing *Re Kentwood*; *Re Trepca Mines*; *Re A Company* (No. 004539 of 1993) [1995] 1 BCLC 459.

must consider all relevant evidence placed before it, whether or not it was before the liquidator at the time the proof was rejected.[20] Depending on the circumstances of the case, cross-examination of deponents of affidavits may be permitted;[21]

(f) the onus of establishing the liquidator was wrong in rejecting (or admitting) the proof rests squarely with the applicant.[22] The applicant must satisfy the Court on the balance of probabilities that the debts in question were (or were not) true liabilities of the company as at the date of winding up before the liquidator's decision will be set aside.[23] However, it is not necessary to establish that the liquidator's rejection (or admission) of the proof of debt involved any impropriety, in the sense of moral opprobrium;[24]

(g) where the applicant's onus is not discharged, the Court will not overturn the liquidator's decision.[25] Similarly, if the Court is unable to conclude whether the proof should be admitted, the liquidator's decision will stand;[26] and

(h) the Court therefore has the power to affirm, vary or reverse the liquidator's decision to reject (or admit) the disputed proof and, if the decision is set aside, direct that the original decision be reconsidered.[27]

Whether Deed prohibits Rock from proving in liquidation of Eliana

46 The central question for consideration in this case is whether the Deed prohibits Rock from proving in the liquidation of Eliana and subrogating to the rights of the

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20 *Re Kentwood*; *Romero v Auty* (2001) 19 ACLC 206, 211 [41] (Warren J, as her Honour then was) ('***Romero v Auty***'); *Capocchiano v Young*, [46] (Kunc J).

21 *Re Jay-O-Bees*, [59] and the cases cited there. See also *McPherson & Keay: The Law of Company Liquidation*, [12-067] and the cases cited there.

22 *Westpac v Totterdell*, 154; *Romero v Auty*, [41]; *Capocchiano v Young*, [46]; *KIS Realty*, [1]; *Rimfire Constructions*, [23]; *Ochre Group Holdings*, [57].

23 *Re Alora Davies Developments 104 Pty Ltd* [2021] NSWSC 1583, [22] (Williams J)

24 *McPherson & Keay: The Law of Company Liquidation*, [12-066], citing *Re Globe Legal Services Ltd* [2002] BCC 858.

25 *Capocchiano v Young*, [46]; *Rimfire Constructions*, [23]; *Ochre Group Holdings*, [57].

26 Ibid.

27 *Re Kentwood*; *KIS Realty*, [1]; *McPherson & Keay: The Law of Company Liquidation*, [12.1340], citing *Renzi v Heywood-Smith* (Supreme Court of South Australia, Johnston J, 11 November 1985).

Commissioner, whilst tax debts remain owing to the Commissioner. The answer to that question is dispositive of the appeal.

Relevance of Deed to income tax and RBA deficit claimed by Commissioner

47 It will be recalled that the Commissioner's revised proof of debt claims outstanding amounts in respect of: income tax ($3,422.12 as at 3 November 2016); an RBA deficit debt ($2,541,990.18 as at 3 November 2016); and SGC ($565,469.19 for 1 July 2015 to 30 June 2016). With respect to the income tax amount and RBA deficit components of the Commissioner's revised proof of debt, I am satisfied that they:

(a) each constitute a Tax-Related Liability under the Deed because they are pecuniary liabilities owing to the Commonwealth and arising directly under 'taxation law', which, as already mentioned, relevantly includes the ITAA36 and ITAA97 (in respect of RBA deficit debts and income tax);

(b) form part of Taxation Debt A and Taxation Debt B (being the Total Taxation Debt), which are each specified in the Deed and are jointly and severally owed by Eliana and Mr Sowiha (as Obligors), who have assumed liability for each other's outstanding Tax-Related Liabilities under cl 4.1 of the Deed;

(c) alternatively represent Eliana's and Mr Sowiha's 'current and future tax obligations under [the ITAA36, ITAA97, TAA] or otherwise' under cl 4.1 of the Deed;

(d) are amounts that Rock agreed to irrevocably and unconditionally assume liability for, and guarantee to the Commissioner payment of, as the Total Taxation Debt and other amounts falling due under or in connection with any Transaction Documents (which include the Deed), in accordance with cl 6.1 of the Deed; and

(e) constitute amounts which, for the purpose of cl 7.5 of the Deed, 'may be, or become payable, by all Obligors under, or in connection with the Transaction Documents [which include the Deed itself]', and which have not been 'irrevocably paid in full'.

48 As a consequence of the above, and by operation of each of cll 7.5(a)(iii) and 7.5(b) of the Deed, because Eliana is indebted to the Commissioner in respect of the relevant amounts claimed in the Commissioner's revised proof of debt, Rock is precluded as a Guarantor from both: (a) subrogating in place of the Commissioner; and (b) proving in the liquidation of Eliana (or otherwise exercising any vote or other rights in respect of any indebtedness of any nature owed by Eliana) until all amounts payable by Eliana and owing under the Deed have been irrevocably paid in full or the Commissioner otherwise directs.

Relevance of Deed to SGC liability claimed by Commissioner

49 Irrespective of the position in relation to the other taxation liabilities, the plaintiff contends that the SGC debts of Eliana do not form part of the Deed and therefore Rock is not prevented by the terms of cl 7.5 from proving for the SGC priority amount claimed in its proof of debt. I do not accept that submission.

50 I am satisfied that the SGC liability claimed in the Commissioner's revised proof of debt is captured by the Deed. It constitutes a Tax-Related Liability, as defined by the Deed, because it is a pecuniary liability owing to the Commonwealth and arising directly under a 'taxation law', namely the SGAA 1992. Further, in all likelihood, the SGC amount formed part of Taxation Debt A in respect of which Eliana and Mr Sowiha (as Obligors) are jointly and severally liable to pay under cl 4.1 of the Deed. In particular, the SGC amount likely fell within the $2,881,863.14 uncharacterised portion of Taxation Debt A, payable by Eliana as at 22 March 2016. Whilst the Commissioner's initial proof of debt suggests Eliana owed an SGC debt in the sum of $1,260,294.41 for the period 1 July 2013 to 30 June 2016, a ledger supplied by the ATO at the time of the lodgement of the Commissioner's further proof of debt ('**SGC ledger**') indicates the SGC amount owing by Eliana as at 22 March 2016 was $502,498.16, including GIC. When this amount is deducted from the $2,881,863.14 undesignated portion of Taxation Debt A, the resulting amount of $2,379,364.98 roughly corresponds with a PAYG tax withheld amount of $2,330,327.40 owing as at 22 March 2016, as disclosed in an ATO RBA statement for Eliana dated 23 March 2017. It therefore appears that individual components of the Commissioner's initial proof of

debt, including SGC and the RBA deficit debt, comprise Taxation Debt A in the Deed. This conclusion is reinforced by the fact that the Commissioner's further proof of debt makes no mention of SGC, in apparent recognition of the receipt of the sale proceeds and their application to Eliana's SGC debt. It follows that the SGC liability likely formed part of the Total Taxation Debt.

51 Irrespective of whether the SGC liability claimed in the Commissioner's revised proof of debt constitutes a Tax-Related Liability falling under Taxation Debt A in the Deed (and part of the Total Taxation Debt), the SGC component clearly falls within Eliana's 'current and future tax obligations' owing under the SGAA 1992 pursuant to cl 4.1 of the Deed. In accordance with cl 6.1 of the Deed, Rock had irrevocably and unconditionally assumed liability for, and guaranteed to the Commissioner payment of, the SGC liability as an 'other [amount] falling due under or in connection with any Transaction Documents' (which include the Deed itself). The SGC liability therefore constitutes an amount which, for the purpose of cl 7.5 of the Deed, 'may be, or become, payable by all Obligors under, or in connection with, the Transaction Documents [which include the Deed itself]', which has not 'been irrevocably paid in full' and which Rock is prevented from proving for or subrogating to the rights of the Commissioner accordingly.

52 The plaintiff argues that even if the SGC liability was covered by the Deed, the payment of the sale proceeds to the ATO on 13 February 2017 had the effect of fully discharging the SGC debt then owing by Eliana, notwithstanding the subsequent s 588FF orders on 27 May 2020 which required the Commissioner to pay to Rock the sum of $550,000.00. According to the plaintiff, cl 7.5(b) of the Deed therefore does not prevent Rock from proving in the liquidation of Eliana for the SGC priority amount of $728,465.83 (which accounts for receipt of the $550,000.00 in accordance with the s 588FF orders). I am unpersuaded by that argument. The better view is that while the payment of the sale proceeds *initially* discharged the $1,278,465.83 SGC liability owing by Eliana to the Commissioner, the s 588FF orders had the effect of *reinstating* the SGC liability to the extent of $550,000. That is because of the operation of the Deed itself.

Clause 7.2 of the Deed specifically contemplates the consequence of a payment to the Commissioner being avoided or reduced for any reason, including as a result of insolvency. In those circumstances, 'the liability of the Guarantors shall continue as if the payment, discharge, avoidance or reduction had not occurred' and the Commissioner 'shall be entitled to recover the value or amount of that … payment from the Guarantors, as if the payment, discharge, avoidance or reduction had not occurred'.

53 In addition, the plaintiff suggests that the $550,000 paid under the s 588FF orders was not for payment of SGC debts, but for settlement of uncommercial transaction and unfair preference claims arising from the Deed and the sale proceeds. I am unconvinced by that argument because:

(a) the voidable transaction proceeding substantially concerned the payment of the sale proceeds, which was alleged to be an uncommercial transaction. Only an additional amount of $31,945.81 was sought as an unfair preference;

(b) the vast majority of the sale proceeds ($1,278,465.83 out of $1,361,248.76, or 94%) were allocated by the Commissioner against Eliana's SGC liability, according to the ATO's own records. Clause 12 of the Deed entitles the Commissioner to allocate payments from Rock, as an Obligor, whether made throughout the operation of this Deed or upon the enforcement of the Securities, 'in whichever manner he consider[ed] appropriate'. Such allocation is given primacy by the Deed and overrides any intended allocation by Rock. Further, there is no evidence that Rock, or its receivers and managers, gave any instruction to the Commissioner at the time of payment of the sale proceeds into Eliana's RBA about how such payment should be allocated towards Eliana's tax obligations. Even if such instruction was given, according to the TAA, the Commissioner was not obliged to comply with it. In doing anything under Div 3 of Pt IIB of the TAA, and pursuant to s 8AAZLE of the TAA, the Commissioner is not bound by any instructions given by any entity about how

payments are to be allocated towards an entity's tax debts owing under a 'taxation law';

(c) unlike the Commissioner's initial proof of debt, the Commissioner's further proof of debt (which followed payment of the sale proceeds) made no claim for SGC;

(d) the SGC ledger maintained by the ATO for Eliana shows that following the s 588FF orders, an amount of $550,000 was re-debited against Eliana's SGC liability. Such amount is claimed as part of the Commissioner's revised proof of debt; and

(e) the plaintiff amended his own originating process and the proof of debt to reduce the quantum of SGC claimed in the proof of debt on account of the $550,000 received under the s 588FF orders. That is fundamentally inconsistent with the argument the $550,000 does not directly relate to SGC.

Conclusion on operation of Deed

54 It follows that on a plain reading of the Deed, Rock is precluded from subrogating to the rights of the Commissioner or proving in Eliana's liquidation (or otherwise exercising any vote or other rights) in respect of the SGC priority amount until such time as the taxation liabilities claimed in the Commissioner's revised proof of debt (which total approximately $3.1 million, including the SGC liability) are paid in full, or the Commissioner otherwise directs.

55 Although the Deed operates as a complete answer to the plaintiff's appeal, given the manner in which the appeal was argued and the overlapping nature of the issues jointly identified by the parties, it is necessary to consider the balance of the issues arising in the proceeding. The first of the remaining questions relates to the availability of equitable subrogation.

Statutory and equitable subrogation

Unavailability of subrogation under s 560 of the Corporations Act

56 Before dealing with the concept of equitable subrogation, it is necessary to briefly comment on the availability of statutory subrogation under s 560 of the *Corporations Act.* In his written submissions, and at the hearing, the plaintiff conceded that statutory subrogation under s 560 of the *Corporations Act* does not apply in respect of the payment by Rock of Eliana's SGC debts. That concession is entirely appropriate.

57 Under s 560 of the *Corporations Act*, if a person advances funds to a company for the purposes of payment 'by [the] company' of wages and other employee entitlements, including superannuation contributions within the meaning of s 556 of the legislation, they are afforded the same rights as a creditor and the same right of priority in the winding up of the company.

58 In *Re Dalma No 1 Pty Ltd (in liq)* ('***Re Dalma***'),[28] an entity related to the company in liquidation made a number of voluntary payments in part satisfaction of employee entitlements, including superannuation contributions, owed by the insolvent company. The related entity contended the advances were made pursuant to s 560 of the *Corporations Act* and sought to be afforded priority under s 556. Justice Brereton considered conformity with the actual language and internal structure of s 560 to be paramount[29] and held that the section only applies where the company in liquidation pays the employee-related liabilities itself, using monies advanced to it by another person.[30] However, because none of the relevant payments were made 'by [the] company' itself, but rather by the related entity directly, the provision was not engaged. In other words, the provision does not extend to payments made on behalf of a company.

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28 (2013) 95 ACSR 641.

29 Ibid 644–5 [10]–[15], relying on *Capt'n Snooze Management Pty Limited v McLellan* [2002] VSC 432 (Hansen J).

30 Ibid 645 [5].

59 Here, no payment was ever made by Rock to Eliana to enable it to make any specified priority payments. Instead, the sale proceeds were directly remitted by the receivers and managers of Rock to the Commissioner to partly satisfy Eliana's debts.

60 Additionally, s 560 does not apply because that provision concerns, among other things, superannuation contributions, as distinct from an SGC debt owed to the Commissioner. The payment by Rock's receivers and managers of the sale proceeds was in respect of the latter.

Principles of equitable subrogation

61 Despite the unavailability of subrogation under s 560, the plaintiff maintains that Rock is entitled to rely on the principles of equitable subrogation to prove in Eliana's liquidation as a priority creditor under s 556(1)(e) of the *Corporations Act*. Authority suggests that equitable subrogation is not excluded because of the operation of s 560.[31] The defendant did not suggest otherwise. The real question is whether the requirements for equitable subrogation are satisfied on the facts.

62 Subrogation essentially involves the transfer of rights from one party to another by operation of law without the assent or any positive action by the person from whom the rights have passed.[32] The concept of equitable subrogation was comprehensively explained by the Full Court of the Federal Court of Australia (comprising Reeves, Farrell and Colvin JJ) in *Lowbeer v De Varda* as follows:[33]

> Subrogation is not an assignment by operation of equity. In England, it has been described by Lord Diplock as a transfer "by operation of law", without "assignment or assent of the person from whom the rights are transferred": *Orakpo v Manson Investments Ltd* [1978] AC 95 at 104. The essence of subrogation in equity is that a party has a right in equity to stand in the shoes of another party and to enforce the rights of another party in the name of that party. This might be described as a form of transfer by operation of law, but the essential character of subrogation is that it does not depend upon an assignment. Further, as the High Court has said in [*Bofinger v Kingsway Group* (2009) 239 CLR 269] at [97], it does not depend upon the bilateral dealings between the party indemnifying and the party being indemnified. Subrogation

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31 *Re Dalma*, 646–7, citing *Cook (as liquidators of Italiano Family Fruit Co Pty Ltd (in liq)) v Italiano Family Fruit Co Pty Ltd (in liq)* (2010) 190 FCR 474, 497–8 [104]–[107] (Finkelstein J). Cf *Re Sara Properties Pty Ltd (in liq) and the Companies Act, 1961* [1982] 2 NSWLR 277.

32 See generally Michael Evans, Bradley L Jones, and Theresa M Power, *Equity and Trusts* (LexisNexis, 4th ed, 2016) [20.1] ('***Equity and Trusts***').

33 (2018) 264 FCR 228, 237 [43]–[44].

> will even operate in equity to revive a right that has been extinguished (such as a right to a security discharged by payment): [*Saraceni v Mentha (No 2)* (2012) 269 FLR 12] at [238]. Therefore, it is not properly characterised as a form of assignment. It is a right to enforce that which might have been enforced by the indemnified party if there had been no performance of the obligation to indemnify.
>
> The essence of subrogation is that the rights that were held by the indemnified party may be enforced by the subrogated party in the absence of an assignment: *DiMella v Rudaks* (2008) 102 SASR 582 at [20]-[34]. It is a right to have the benefit of the rights of the indemnified party in respect of the subject matter of the payment made under the indemnity: *State Government Insurance Office (Qld) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228 at 240-243 …

63 An established instance of subrogation involves a surety or guarantor who pays the debt owed by a principal debtor and is thereby entitled to be subrogated to any securities and other rights given by the principal debtor to the creditor as security for the debt.[34] In *Sunbird Plaza Pty Ltd v Maloney*,[35] Mason CJ explained:

> Once default has occurred, the party having the benefit of the guarantee can call on the guarantor to honour his promise before calling on the principal contracting party to perform his obligation, but the guarantor, having honoured his promise, can hold the principal contracting party to account by virtue of the doctrine of subrogation.[36]

64 There is authority that the right of subrogation only arises where the surety has discharged the whole of the debt covered by the relevant securities.[37] Similarly, a guarantor will only acquire, by subrogation, the creditor's right of proof against the debtor, or right to be subrogated to the creditor's securities granted by the debtor, where the guarantor has paid the debt in full.[38] However, other authority suggests a surety's right of subrogation arises when the principal creditor has been paid in full

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34 See *Equity and Trusts*, [20.9], citing *Toppi v Lavin* [2013] NSWSC 1931, [23] (White J) and the further authorities cited there. For completeness, see also s 52 of the *Supreme Court Act 1986* (Vic), which, together with equivalents in other Australian jurisdictions, is the legislative re-enactment of s 5 of the *Mercantile Law Amendment Act 1856* (Imp) and which, according to the High Court in *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 12 [37], provides a summary mode of carrying into effect rights and remedies otherwise available in courts of equity (citing *Embling v McEwan* (1872) 3 VR (L) 52, 53–4; *Hardy v Johnston* (1880) 6 VLR (L) 190, 193).

35 (1988) 166 CLR 245.

36 Ibid 254.

37 *Equity and Trusts*, [20.9], citing *Ex Parte Brett; Re Howe* (1871) LR 6 Ch App 838, 841; *Austin v Royal* (1999) 47 NSWLR 27, 32–3 (Cole AJA, Meagher JA agreeing at 33 [24], Handley JA agreeing at 33 [25]); *Palmer v Orix Australia Corp Ltd* [2006] NSWSC 1208, [8] (Brereton J).

38 *Re Sass; Ex parte National Provincial Bank of England* [1896] 2 QB 12, 14–15 (Vaughan Williams J) ('***Re Sass***'); *Re Octaviar*, 168.

in respect of the secured debt, though not necessarily by the surety.[39] Regardless of who makes the payment, the authorities are clear that the entirety of the creditor's debt must be discharged. Although part payment of the creditor's secured debt by a guarantor will not entitle the guarantor to be subrogated to any extent in relation to the creditor's securities, it will permit the guarantor to seek an indemnity from the principal debtor for that amount.[40]

65 In *Registrar General v Gill*,[41] Gleeson CJ and Priestley JA (with whom Mahoney JA agreed) said:

> The equitable principles relating to subrogation aim to adjust the interests of three parties, such as a creditor, a debtor and an insurer or surety, in such a way as to avoid the unconscionable result of double recovery by the creditor or inequitable discharge of the liability of the debtor …

66 However, as the High Court stated in *Bofinger v Kingsway Group* ('***Bofinger***'),[42] the principles of equity do not operate at large or in an idiosyncratic fashion.[43] In that regard, the High Court cited with approval Millett LJ's observation in *Boscawen v Bajwa*[44] that:

> The equity [in respect of subrogation] arises from the conduct of the parties on well settled principles and in defined circumstances which make it unconscionable for the defendant to deny the proprietary interest claimed by the plaintiff.

67 In *Bofinger*, the appellants had given guarantees to a number of mortgagees in relation to monies borrowed by a related company that ultimately went into liquidation. The mortgagees held mortgages over real property owned by the company and the guarantees given by the appellants were supported in each case by a mortgage over real property owned by them. The appellants sold their properties and applied the proceeds in reduction of the company's indebtedness. The first mortgagee of the company then exercised power of sale over mortgaged properties owned by the

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39 See *Equity Trustees Executors & Agency Co Ltd v New Zealand Loan & Mercantile Agency Co Ltd* [1940] VLR 201, 207–8 (Lowe J); *A E Goodwin Ltd v A G Healing Ltd* (1979) 7 ACLR 481, 487–8 (Powell J); *McColls Wholesale Pty Ltd v State Bank* (NSW) [1984] 3 NSWLR 365, 368 (Powell J).

40 *Re Octaviar*, 168–9.

41 *Registrar General v Gill* [1994] NSWCA 261, 4 [35] (Gleeson CJ and Priestley).

42 (2009) 239 CLR 269 ('***Bofinger***').

43 Ibid 301 [94] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

44 [1996] 1 WLR 328, 335.

company and, after satisfying the balance of the indebtedness of the company, gave the surplus sale proceeds to the second mortgagee. The High Court held that once the sale by the first mortgagee had completed, the first mortgagee was obliged in good conscience (and as a fiduciary) to account to the appellants for surplus monies and securities it held.[45] Further, the appellants were entitled to assert their rights of subrogation with respect to the first mortgage and had not acted in breach of any restrictions binding them by reason of the terms of the guarantee of the second mortgage.[46] The High Court concluded there was no displacement of the priority as between the respective mortgagees and the consecutive guarantees produced no inconsistency because each operated in accordance with its terms.[47] Further, nothing in the circumstances of the case rendered it inequitable for the appellants to enjoy the rights of subrogation.[48]

68 In *Saffron Sun Pty Ltd v Perma-Fit Finance Pty Ltd (in liq),*[49] Windeyer J endorsed a definition of subrogation taken from the United States text, *Sheldon: Law of Subrogation* (2nd ed, 1892) as follows:

> It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter; but it is not to be applied in favour of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and it is not allowed where it would work any injustice to the rights of others.[50]

69 In *Cook v Italiano Family Fruit Co Pty Ltd (in liq)* (***'Italiano Family Fruit Co'***),[51] Finkelstein J allowed subrogation in respect of an unsecured debt in particular circumstances. There, priority creditors had been paid with funds of a third party bank that had been misapplied in breach of trust and without the consent of the bank.[52] His Honour acknowledged that the voluntary nature of a payment was often a bar to

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45 *Bofinger*, 290 [49].
46 Ibid 294 [66], 295 [71].
47 Ibid 295 [71].
48 Ibid.
49 (2005) 65 NSWLR 603, 608 [14].
50 This summation of principle was also endorsed by Hamilton AJ in *Ogilvie v Ferry* [2010] NSWSC 379, [79]–[81] (***'Ogilvie'***).
51 (2010) 190 FCR 474.
52 Ibid 493 [80].

subrogation (which was said to reflect equity's concerns for the autonomy of the debtor), but that the payment would not be considered to be voluntary where it was made at the express or implied request of the debtor.[53] He also considered that where there has been a voluntary payment of prior securities, subrogation will be denied where the claimant would be placed in a better position than he/she bargained for.[54] In all the circumstances, his Honour considered that it was equitable to permit subrogation and, at the same time, unconscionable to deny it because to do so would allow the company in liquidation (and indirectly its unsecured creditors) to enjoy a windfall from the company's debts being paid out of secured assets.[55]

70 In *Re Dalma*, Brereton J held that a right of subrogation did not arise because payments of unsecured debts (which were employee entitlements) by an entity related to a company in liquidation had been made spontaneously and voluntarily.[56] His Honour distinguished *Italiano Family Fruit Co* on the basis that the payment there was involuntary and because there was no equity affecting the conscience of the debtor company such that it would be unconscionable to deny subrogation.[57] His Honour expressed the view, by way of obiter, that the only context in which a spontaneous voluntary payment by a third party can found a claim for subrogation is in the exceptional category of the payment of an existing mortgage or other security, but that the principle did not extend to unsecured debts.[58]

71 Finally, it is appropriate to note the cases of *Divitkos, in the matter of ExDVD Pty Ltd (in liq)* (***'Re ExDVD'***)[59] and *Weston (Liquidator); In the Matter of 7 Steel Distribution Pty Limited (in liq)* (***'Re 7 Steel'***),[60] both of which are relied upon by the plaintiff. In each case, a secured creditor appointed receivers of a company in external administration. Following the realisation of the relevant security, the receivers made payments to the insolvent company's employees in accordance with the legislative mandate in

53 Ibid 499 [113]–[114], citing *Owen v Tate* [1976] 1 QB 402, 411.
54 Ibid 499–500 [115].
55 Ibid 496 [98], 500 [116].
56 *Re Dalma*, 651–2.
57 Ibid.
58 Ibid 652.
59 (2014) 223 FCR 409 (***'Re ExDvD'***).
60 [2015] FCA 742 (***'Re 7 Steel'***).

s 433(3)(c) of the *Corporations Act*. The effect of those payments was that the amount ultimately paid to the secured creditor (after the realisation of its security) was reduced by a corresponding amount. In each case, the secured creditor sought to be subrogated with the same priority in the liquidation as the company's employees would have received pursuant to s 556 of the legislation. In *Re ExDVD*, White J held that an equitable right of subrogation is recognised where one person is 'required by law' to discharge the security of another.[61] Because the receivers had been required to pay the company's liability to the employees, and thereby diminish the value of the security held by the secured creditor, it was considered to be unconscionable for the company or its unsecured creditors to have the benefit of the compulsory payment.[62] As a consequence, the secured creditor was permitted to exercise the equitable right of subrogation to the extent its security had been diminished by the employee payments.[63] Justice White's reasoning in *Re ExDVD* was followed by Foster J in *Re 7 Steel*.[64]

Submissions on equitable subrogation

72 By his written and oral submissions, the plaintiff principally argues that the payment by Rock's receivers of the settlement proceeds wholly satisfied Eliana's SGC liability to the Commissioner and that it was unconscionable for the defendant to deny Rock the right to subrogation in respect of its claim for the SGC priority amount.[65] The plaintiff also contends that Rock's payment to the Commissioner was not done voluntarily or spontaneously on its own motion. Whilst the plaintiff does not suggest that Rock was compelled under the Deed to pay Eliana's SGC debt, he argues that Rock was compelled by law to make the payment to achieve the withdrawal of the caveat lodged on the Bond Street Property by the Commissioner, which the plaintiff contended the Commissioner was not entitled to lodge.

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61 *Re ExDVD*, 424 [77]–[78].
62 Ibid 424 [78]–[79].
63 Ibid 424 [79].
64 *Re 7 Steel*, [29]–[33]. The reasoning in *Re ExDVD* was also followed by Dowsett J in *Currie, Re Auto Electrical Distributors Pty Ltd (in liq) v Auto Electrical Distributors (Aust) Pty Ltd (in liq)* [2014] FCA 885.
65 Principally citing *Bofinger*.

73 Conversely, the defendant submits Rock was not compelled by law to make payment to the Commissioner. Instead, he contends that Rock voluntarily elected to pay the Commissioner rather than make an application to remove the caveat on the Bond Street Property and retain the sale proceeds. Further, even if the Court was minded to exercise its equitable jurisdiction to permit subrogation by Rock, the operation of the rule against double proofs and the nature of Rock's promise in the Deed not to prove in Eliana's liquidation preclude that course.

Whether equitable subrogation available

74 In the circumstances of the case, I do not consider it would be unconscionable to deny Rock the right of subrogation. Rather, it would be inequitable to permit subrogation in the circumstances. I have arrived at that conclusion for the reasons below.

75 *First*, as I have found, under cl 7.5 of the Deed, Rock explicitly agreed to defer its rights as Guarantor to subrogate to the rights of the Commissioner. Because of the restraints in cl 7.5 of the Deed, Rock has no standing as a creditor to subrogate in place of the Commissioner for the SGC priority amount and/or to prove in the liquidation of Eliana. Allowing Rock to subrogate to the rights of the Commissioner would place Rock in a better position than it bargained for under the Deed.

76 *Secondly*, as I have already held, even if Rock discharged Eliana's SGC liability then owing to the Commissioner, the s 588FF orders had the effect of reinstating the SGC liability to the extent of $550,000. This was a result specifically contemplated by cl 7.2 of the Deed. Critically, because additional taxation liabilities are owing by Eliana, which are claimed in the Commissioner's revised proof of debt and caught by the terms of the Deed, the liabilities owed to the Commissioner by Eliana, and guaranteed by Rock, have not been paid in full. As the authorities make clear, Rock, as a Guarantor under the Deed, is not entitled to subrogate to the rights of the Commissioner unless and until those liabilities have been fully paid. Alternatively, Rock can only prove if the Commissioner provides his consent (as contemplated by cl 7.5 of the Deed). There is no evidence the Commissioner has done so.

77 *Thirdly*, having regard to the Deed, it is unclear how it would be unconscionable to deny Rock the right to subrogate to the rights of the Commissioner. Further, I am not satisfied it would be unconscionable for Eliana (and indirectly, its priority creditors) to retain the benefit of the SGC priority amount claimed by Rock. Eliana and its priority creditors do not stand to gain any windfall from the payment of Eliana's debts out of the assets of Rock, as its Guarantor under the Deed. There is no possible result of double recovery by the Commissioner and there is no evidence of any inequitable discharge of Eliana's liability to the Commissioner. For example, the plaintiff has not established the sale proceeds were misapplied in breach of trust, unlike the position in *Italiano Family Fruit Co*. Nor did the plaintiff identify any other equity affecting the conscience of Eliana such that it would be unconscionable to deny subrogation.[66]

78 *Fourthly*, in contrast to the position in *Bofinger*, to recognise Rock's right to subrogate would displace the priority of rights between the Commissioner and Rock as agreed to in cl 7.5 of the Deed. It would work an injustice on the rights of the Commissioner.

79 *Fifthly*, Rock (through the plaintiff) applies for equitable relief in circumstances where it seeks to avoid the promises it made under the Deed not to subrogate and not to prove in Eliana's liquidation. It seeks to benefit from its breach of the Deed and the avoidance of its obligations. In accordance with the maxim 'he who seeks equity must do equity', the Court will look to the conscience of the applicant in the context of their legal and equitable obligations when deciding whether to grant equitable relief and may choose to only grant relief on conditions.[67] Rock's conduct in attempting to circumvent the express terms of the Deed it agreed to is a basis for the Court to refuse equitable relief until the taxation liabilities of Eliana and Mr Sowiha, which have been guaranteed by Rock under the Deed, are fully discharged.

80 *Lastly*, unlike the position in *Re ExDVD* and *Re 7 Steel* (which are relied upon by the plaintiff), I am not satisfied that the payment of the sale proceeds to the ATO for the purpose of reducing Eliana's SGC liability was required by law. The statutory

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66 See *Re Dalma*, 651–2.

67 See *Equity and Trusts*, [3.5]. See also JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 5th ed, 2014) [3-050].

obligation under s 433(3)(c) of the *Corporations Act*, which compelled the receivers in those cases to pay employee entitlements of the relevant companies, does not apply here because it was not Rock's SGC debt that was paid; it was Eliana's debt. The facts of *Re ExDVD* and *Re 7 Steel* are also distinguishable because the entity making the relevant payment in respect of the priority debts of the insolvent company was a secured creditor whose security had diminished in value as a consequence of the making of the payment. That is not the position here.

81 Moreover, I do not accept the plaintiff's argument that Rock was compelled at law to make the payment of the sale proceeds to effect the removal of the caveat on the Bond Street Property. In circumstances where the plaintiff argues there was no basis for the Commissioner to lodge the caveat and the Bond Street Property was not covered by the definition of Securities under the Deed (an argument in respect of which I have nevertheless expressed doubt), the plaintiff has not adequately explained why Rock did not make an application to the Court to have the caveat removed prior to the settlement of the Bond Street Property, or why it did not seek to substitute the Securities given under the Deed in accordance with cl 10. Viewed objectively, the payment of the sale proceeds to the ATO was made voluntarily by Rock. The decision to make the payment appears to have been a pragmatic one.

82 However, even if I am wrong and the payment of sale proceeds was not truly voluntary, but was required by law, the other reasons I have set out above are sufficient in themselves to deny Rock the right of equitable subrogation.

83 As I discuss further below, equitable subrogation is also unavailable to Rock because of the rule against double proofs.

Rule against double proofs

Operation and purpose of rule against double proofs

84 The rule against double proofs, which is a long-standing principle of insolvency law, requires that there cannot be more than one proof lodged in respect of the same debt.[68] The rule is designed to prevent two creditors proving and receiving dividends in respect of what is substantially the same debt or claim[69] and seeks to produce equality and fairness as between claimants on an insufficient fund.[70]

85 In *Barclays Bank Ltd v TOSG Trust Fund Ltd* (‘***Barclays Bank v TOSG***’) ,[71] Oliver LJ further explained the rule against double proofs in this way:

> It is simply whether the two competing claims are, in *substance*, claims for payment of the same debt twice over. … [T]he rule against double proofs in respect of two liabilities of an insolvent debtor is going to apply wherever the existence of one liability is dependent upon and referable only to the liability to the other and where to allow both liabilities to rank independently for dividend would produce injustice to the other unsecured creditors. The rule has nothing to say upon the question of which of two proving creditors has the better right to claim a dividend in respect of his debt. It bears merely upon the question whether both are to be admitted for dividend and stems from the fundamental rule of all insolvency administration that, subject to certain statutory priorities, the debtor’s available assets are to be applied pari passu in discharge of the debtor’s liabilities. One way of testing the matter is to ask, in relation to any liability for which proof has been lodged, whether it arises as a result of a payment made in discharge or partial discharge of another liability for which a proof has also been lodged. If the answer to that is affirmative, then it is clear that a distortion of the pari passu principle would occur if both proofs are admitted in full. A simpler test, perhaps, is to postulate the question – what would the position be as regards the payment of the liabilities in respect of which proofs have been lodged if the debtor were now solvent?[72]

86 In the same case, Slade LJ[73] observed:

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68 See *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] AC 626, 636 (Oliver LJ) (‘***Barclays***’); *Day & Dent Constructions Pty Ltd (in liq) v North Australian Properties Pty Ltd* (1982) 150 CLR 85, 100 (Mason J); *Western Australia v Bond Corporation Holidays Ltd (No 2)* (1992) 37 FCR 150, 161 (French J) (‘***Western Australia v Bond Corporation***’). See also *McPherson & Keay: The Law of Company Liquidation*, [12-018]; Roy Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th ed, 2011) [8-45].

69 *McPherson & Keay: The Law of Company Liquidation*, [12-018], citing *Re Oriental Commercial Bank; Ex parte European Bank* (1871) LR 7 Ch App 99, 102–4 (Mellish LJ) (‘***Re Oriental Commercial Bank***’); *Re Hoey* (1919) 88 LJ KB 273; *Re Polly Peck International plc (in admin) No 3* [1996] 1 BCLC 428 and the other authorities referred to there. See also *Western Australia v Bond Corporation*, 162.

70 *McPherson & Keay: The Law of Company Liquidation*, [12-018], citing *Star v Silva (No 2)* (1994) 12 ACLC 608, 617 (Brownie J).

71 [1984] AC 626.

72 Ibid, 636.

73 Ibid, 660.

> Difficulty may well arise in determining whether, in any given case, two proofs are in respect of what is in substance the same debt.…The question can, I think, only be determined by reference to the particular facts of the case before the court, bearing in mind that is the substance of the relevant liability, rather than the form, on which attention must be concentrated.

87 In *Western Australia v Bond Corporation Holdings Ltd (No 2)*,[74] French J (as his Honour then was) cited with approval the above passage of Slade LJ in *Barclays Bank v TOSG* and confirmed:

> The question whether two claims arise out of the same liability is a matter of substance not of form. It may be said that the claim of a principal creditor in respect of its debt and the claim of a surety in respect of the debtor's failure to indemnify it are distinct. But in substance they relate to the same debt.

88 The rule against double proofs has often been invoked to prevent a surety from proving in the insolvent estate of the debtor where the principal creditor has also made a claim.[75] In *McColl's Wholesale Pty Ltd v State Bank of New South Wales*,[76] Powell J held:

> Prima facie, the surety's right to an indemnity [as against the principal debtor] is converted into a right to prove in the winding up. However, because of the rule against double proof in the winding up of insolvent companies (see *Oriental Commercial Bank; Ex parte European Bank* (1871) LR 7 Ch App 99) the surety cannot prove in the winding up in respect of any amount which he has paid pursuant to his guarantee unless the creditor's debt has been paid in full, or, in the case of a guarantee of part of the debt – as opposed to a limited guarantee (see *Re Sass; Ex parte National Provincial Bank of England Ltd* [1896] 2 QB 12) – the surety has paid to the creditor the full amount for which he is liable: *Re Sass; Ex parte National Provincial Bank of England Ltd*.

89 Similarly, a guarantor cannot prove for the amount paid by it until the principal creditor has received repayment of the whole of the debt.[77]

90 The rationale for this rule was explained by the learned authors of *Goode on Legal Problems of Credit and Security*[78] in this way:

> It is a well settled principle of equity that until the creditor has received payment of the guaranteed debt in full the surety cannot prove in the insolvent

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74 (1992) 37 FCR 150, 163-4.

75 See *Re Fenton; Ex parte Fenton Textile Association Ltd* (1931) 1 Ch 85; *Day & Dent Constructions Pty Ltd (in liq) v North Australian Properties Pty Ltd* (1981) 54 FLR 277, 293 (Forster and McGregor JJ); *Western Australia v Bond Corporation*, 162 and the cases cited there.

76 [1984] 3 NSWLR 365, 379.

77 *Re Octaviar*, 164–5; See also *Seabird Corporation (in liq) v Sherlock* (1990) 2 ACSR 111, 115 (Cohen J) ('***Seabird***').

78 Roy Goode and Louise Gullifer, *Goode on Legal Problems of Credit and Security* (Sweet & Maxwell, 4th ed, 2008) [8-18].

> debtor's state for a sum paid by him to the creditor, the reason being that he has, expressly or by implication, undertaken to be responsible for the full sum guaranteed, including whatever remains due to the creditor after receipt of dividends by him out of the bankrupt's estate, and thus has no equity to prove for his right of reimbursement in competition with the creditor. If the creditor were required to give credit for a pre-bankruptcy part payment by the surety, neither of them could prove for the amount of such payment and the general body of creditors would thus be unjustly enriched.[79]

91 The plaintiff directed the Court to Mandie J's consideration of the rule against double proofs in *Re Master Painters Association of Victoria Ltd (subject to deed of company arrangements); Deputy Federal Commissioner of Taxation v Rathner* ('***Master Painters***').[80] In that case, the Deputy Commissioner of Taxation had appealed a partial rejection of a proof of debt by the deed administrator of a company. The part of the proof of debt disallowed related to SGC. The deed administrator ostensibly disallowed the proof of debt partly because he believed the SGC claimed by the Deputy Commissioner and superannuation contributions made by the employer company related to the same, or substantially the same, debt. After reviewing the relevant authorities and closely considering the nature of the debts claimed, Mandie J concluded that the rule against double proofs did not apply. His Honour stated that the rule against double proofs concerned circumstances in which rival claims were made on the same limited fund and operated to prevent payment being made twice in respect of the same, or substantially the same, debt.[81] His Honour determined that in the case before him, there were no rival claims and no possibility of payment being made twice or of double dividends being paid out of the limited fund.[82]

Application of rule against double proofs

92 In my view, the rule against double proofs has clear application to the facts of the case. As a Guarantor and Obligor under the Deed, Rock cannot prove for the SGC priority amount claimed in its proof of debt until the Commissioner, as principal creditor, has received the entirety of the SGC liability, along with the income tax amount and RBA deficit components of his revised proof of debt. As I have already explained, under

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79 Quoted and adopted by McMurdo J in *Re Octaviar*, 165. The equivalent passage from the 2nd edition of the text was similarly quoted and adopted by Cohen J in *Seabird*, 115.

80 [2004] VSC 352 ('***Masters Painters***').

81 Ibid [29].

82 Ibid.

cl 6.1 of the Deed, Rock irrevocably and unconditionally agreed to assume liability for, and guaranteed to the Commissioner payment of, each of these amounts. In the particular case of the SGC liability, I have found it was an amount owing at the time of entry into the Deed, which likely formed part of Taxation Debt A (and therefore the Total Taxation Debt). It is also part of Eliana's 'current and future tax obligations' for the purpose of cl 4.1 of the Deed and an '[amount] falling due under or in connection with any Transaction Documents' (which include the Deed itself) in accordance with cl 6.1. Because the s 588FF orders had the effect of reinstating the SGC liability to the extent of $550,000, the Commissioner has not received payment of the guaranteed debt in full. It is not the case that Rock only guaranteed part of the Taxpayer's liabilities and therefore can prove for the amount paid. Rock undertook to be responsible for the entire sum guaranteed.

93 Further, the SGC liability claimed in the Commissioner's revised proof of debt is in substance the same liability as the SGC priority amount claimed in Rock's proof of debt. Applying the test set out by Oliver LJ in *Barclays Bank v TOSG*, it is clear the SGC priority amount claimed by Rock arises as a result of a payment made in discharge, or partial discharge, of another liability relating to SGC for which the Commissioner has also lodged a proof.

94 In his written submissions, the plaintiff contended there is no double proof as the amount claimed by Rock and the amounts claimed by the Commissioner do not overlap, but:

> comprise the total amounts paid by each of those parties for SGC debts (although the amount paid by the Commissioner to Rock of $550,000 was not payment of SGC debts – it was settlement of [the voidable transaction claim] …)

95 I reject that submission. Because the SGC liability claimed by the Commissioner is the subject of Rock's guarantee and remains unpaid, Rock has no equity to prove for its right of reimbursement in competition with the Commissioner. The fact that the plaintiff has amended his originating process and reduced the amount claimed in the proof of debt to the sum of $728,465.83 to take into account the $550,000 payment

received by Rock from the Commissioner is not to the point. The amendment was simply necessary to ensure the plaintiff (on behalf of Rock) did not claim twice. Further, I have already explained why the plaintiff's characterisation of the $550,000 payment by the Commissioner pursuant to the s 588FF orders is unconvincing. The payment plainly relates to SGC.

96 The plaintiff also placed reliance on the *Re Master Painters* case in support of the contention that it was possible to admit both Rock's proof of debt and the Commissioner's revised proof of debt so long as there was no practical overlap between the amounts claimed. The plaintiff suggested that in *Re Master Painters*, the Court adjudicated on two proofs of debt that identified claims for the same debt, that both proofs were admitted, but that the liquidator ensured the dividend paid to the two creditors in question did not exceed the percentage dividend paid to all the other unsecured creditors. With respect, this misstates the facts and the conclusion reached in that case. The Court was not called to adjudicate between rival claims on the same limited fund. The only proof of debt in question was Rock's proof. In any event, the decision is distinguishable on the facts. Here, unlike in *Re Master Painters*, the SGC amounts claimed by each of Rock and the Commissioner are, in substance, the same liability and Rock (as a guarantor) is in competition with the Commissioner (as the principal creditor).

97 Further, I accept the defendant's submission that to allow Rock to prove for the SGC priority amount would create an unsatisfactory scenario whereby the Commissioner might be paid out a portion of his claim for the SGC liability, Rock as guarantor might be paid out a portion of the SGC priority amount claimed, and the Commissioner would then be compelled to seek to recover the dividend received by Rock pursuant to the terms of the guarantee under the Deed.

98 In his written submissions, the plaintiff made passing reference to the New South Wales Court of Appeal decision in *Lumley General Insurance Limited v Oceanfast Marine*

Pty Ltd & Ors[83] (‘***Oceanfast***’) and the earlier English authority of *Moule v Garrett* [84] in apparent support of his equitable subrogation and the non-application of the rule against double proofs. In *Oceanfast*, the appellant was a payer under a number of performance bonds provided to the purchasers of tug boats contracted to be built by a builder. The builder and a related guarantor company went into voluntary administration, resulting in a loss of approximately $15 million to the purchasers of the boats. The purchasers made demand upon the appellant under the performance bonds and the appellant paid the purchasers $5 million. Both the purchasers and the appellant sought to prove in the administrations of the builder and its guarantor; the purchasers as to $15 million and the appellant as to $5 million. Allowing an appeal against the decision of Austin J at first instance, Priestley JA and Giles JA (Beazley JA, dissenting) held that the rule against double proofs did not apply because the appellant’s payment was in partial satisfaction of the purchasers’ claim of $15 million, with the result being that the appellant could prove for $5 million and the purchasers could only prove for $10 million.[85] In arriving at this conclusion, the majority applied the equitable principle referred to by Cockburn CJ in *Moule v Garrett*,[86] namely that:

> ‘Where the plaintiff has been compelled by law to pay, or being compelled by law, has paid money which the defendant was ultimately liable to pay, so the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in that amount.’

99 However, *Oceanfast* can be distinguished on a number of bases. Firstly, no question of subrogation was argued in that case. Instead, the appellant claimed a right to recoupment from the builder who had received the benefit of the $5 million paid in partial satisfaction of the purchasers’ $15 million claim against it. Secondly, in contrast to the position in *Oceanfast* where the purchasers’ competing proof was reduced because of payment by the appellant, there can be no argument in this case that the Deputy Commissioner’s proof of debt should somehow be reduced on account of the SGC priority amount claimed in Rock’s proof of debt. Thirdly, as Giles JA observed,

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83 [2001] NSWCA 479 (‘***Oceanfast***’).
84 (1872) LR Ex 101 (‘***Moule v Garrett***’).
85 Ibid [5]-[7] (Priestley JA), [162]-[164] (Giles JA).
86 (1872) LR Ex 101, 104.

the result in *Oceanfast* may well have been a different one had the performance bond in question been treated as a guarantee (which it was not).[87] Lastly, the instruments under consideration in *Oceanfast* did not include anything equivalent to cl 7.5 of the Deed by which Rock unequivocally agreed to defer its rights as Guarantor to subrogate to the rights of the Commissioner and/or to prove in Eliana's liquidation.

100 There is therefore no basis to proceed as if the SGC amounts claimed by each of Rock and the Commissioner are somehow partitioned. They cover the same ground. The rule against double proofs is a further reason why the plaintiff's appeal must fail.

Other matters

101 In its written and oral submissions, the plaintiff made repeated reference to the defendant's conduct in making the later adjudication, including observations about its timing and surrounding context. Having regard to the relevant authorities, I accept the defendant's submission that these matters are inherently irrelevant for the purposes of determining the appeal.

102 Regulation 5.6.55 of the *Corporations Regulations* expressly empowers a liquidator to revoke or amend the decision to admit a proof of debt where he/she consider the proof has been wrongly admitted. In other words, it permits a liquidator to change his/her mind. The liquidator must, of course, communicate the revocation or amendment of the earlier decision within 7 days, in accordance with reg 5.6.54 and provide the creditor with information about the avenue of appeal. There is no dispute that has occurred here. I am also satisfied that the defendant made genuine attempts to contact the plaintiff prior to the events of the meeting of creditors on 2 August 2022 to discuss Rock's proof of debt, and obtained further legal advice on the proof of debt as soon as practicable after the earlier adjournment of the meeting.

103 In any event, there is nothing in the evidence to suggest the defendant's later adjudication was made capriciously, in bad faith or without proper regard to the relevant facts and law.

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87 *Oceanfast* [168] (Giles JA).

Conclusion

104 In this appeal of the defendant's decision to reject Rock's proof of debt, the plaintiff bore the onus of demonstrating the debt in question was a true liability of Eliana and enforceable against it according to law. He has failed to discharge that onus. That is because Rock is barred from proving in the liquidation of Eliana (or otherwise exercising any vote or other rights), and subrogating to the rights of the Commissioner, by clear operation of cl 7.5 of the Deed. Additionally, Rock is unable to rely on the principles of equitable subrogation to prove in Eliana's liquidation as a priority creditor under s 556(1)(e) of the *Corporations Act*, including because of the rule against double proofs. It follows that the defendant's decision must stand. The appeal will be dismissed accordingly.

105 I will hear the parties on the appropriate formulation of orders, including as to costs.

CERTIFICATE

I certify that this and the 40 preceding pages are a true copy of the reasons for judgment of Hetyey AsJ of the Supreme Court of Victoria delivered on 2 November 2023.

DATED this first day of December 2023.

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Associate