

# CITY INSOLVENCY DISCUSSION GROUP

**Wednesday, 7 November 2018**

## **TOPIC**

*Hamersley v Forge: Dawn of s553C*

## **PRESENTED BY**

Matt Keating and Nick Steinsvaag – Valenti Lawyers



# HLB Mann Judd CIDG / City Insolvency Discussion

Conference Chair: Greg Quin

Speakers: Matt Keating and Nick Steinsvaag



# Batman v Superman (Hammersley v Forge)

Dawn of ~~Justice~~ s553C  
*Corporations Act 2001*



# Background

Hamersley (Batman) engaged Forge (Superman) as builder to carry out work connected with the construction of 2 power stations (possibly intended to provide power to the Batcave).



## Lex Luthor enters

To fund construction, Forge (Superman) obtained funding from ANZ (Lex Luthor – Superman’s nemesis), which was secured by a charge over all of Forge’s present and after-acquired property contained in a General Security Agreement (Kryptonite). The GSA (Kryptonite) was registered on the PPSR.

Forge and ANZ also entered into a Common Terms Deed and Security Trust Deed in relation to the funding and granting of security.



# Superman strikes

Forge (Superman) went into voluntary administration (had a crisis of conscience).

Lex Luthor (ANZ) used his powers under the Kryptonite (GSA) to appoint receivers and managers to Superman (Forge) and Superman (Forge) eventually went into liquidation.

The receivers and managers appointed by Luthor (ANZ) caused Superman (Forge) to sue Batman (Hamersley) for money owing to Superman (Forge) under the contracts.



# Batman counters

Hamersley claimed (among others):

- Set-off under s553 *C Corporations Act* 2001;
- Set-off rights under the contracts; and
- Equitable set-off.

Roughly \$100m greater than Forge's claims.

The Court assumed, for the purpose of its decision, that (other than the question of set-off) Hamersley and Forge were entitled to the sums they claimed.



# Section 553C, Corporations Act

- (1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:
  - (a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and
  - (b) the sum due from the one party is to be set off against any sum due from the other party; and
  - (c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.
- (2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.



# Requirements of s553C

1. Are there dealings between the parties?
2. Are those dealings capable of giving rise to claims by each party against the other?
3. Are those claims, at the relevant time, mutual?



# Requirement of mutuality

In *Gye v McIntyre*, the High Court held mutuality involved 3 considerations:

1. The credits, debts or claims must be between the same people;
2. The benefit or burden must lie in the same interests; and
3. The claims must ultimately sound in money.



# Relevant provisions of the *PPSA*

Section 18(1) provides:

- (1) A security agreement is effective according to its terms.



# Relevant provisions of the *PPSA*

Section 19 provides, relevantly:

- (1) A security interest is enforceable against a grantor in respect of particular collateral only if the security interest has attached to the collateral.
- (2) A security interest *attaches* to collateral when:
  - (a) the grantor has rights in the collateral, or the power to transfer rights in the collateral to the secured party; and
  - (b) either:
    - (i) value is given for the security interest; or
    - (ii) the grantor does an act by which the security interest arises.



# Relevant provisions of the *PPSA*

Section 80(1)(a) provides:

- (1) The rights of a transferee of an account or chattel paper (including a secured party or a receiver) are subject to:
  - (a) the terms of the contract between the account debtor and the transferor, and any equity, defence, remedy or claim arising in relation to the contract (including a defence by way of a right of set-off); [...]



**ANZ**



Receivers and  
managers  
appointed

General Security  
Agreement

**Forge**

**Hamersley**



Construction contract  
claims (~\$85m)

Set-off claims  
(~\$185m)



## Round 1 – First Instance Decision

Tottle J found that Hamersley was not entitled to set-off its claims because, broadly:

- s80(1)(a) of the PPSA did not apply to Forge's claims (being the subject of ANZ's security);
- s553C of the Corporations Act is an exclusive code – it operates to the exclusion of all other set-off rights; and
- the Kryptonite (GSA) prevented s553C from applying because it destroyed the mutuality of dealings.



## Round 2 – Court of Appeal Decision

The Court of Appeal unanimously overturned the decision on the following basis:

- Section 80(1)(a) of the PPSA did apply to the GSA and Common Terms Deed – so ANZ took its security subject to the terms of the Construction Contracts;
- Section 553C is not an “exclusive code”, so if s553C does not apply, other rights of set-off (eg. contractual / equitable) may provide an alternative basis;



## Round 2 (continued)

- In determining mutuality, question is whether “payments received can be used for the benefit of the grantor”;
- Attachment of a security interest under the PPSA to a debt owed by the grantor does not necessarily destroy mutuality;
- Court found that Forge was entitled in its own right to the benefit of its claims against Hamersley;
- So there was mutuality for the purposes of s553C;



## Round 2 (still continued)

- Alternatively, if the Court was wrong about s553C applying, Hamersley had a right of set-off under the terms of the construction contracts.



# Batman (Hammersley) Wins!



# Round 3 - High Court rematch



VALENTI  

---

COMMERCIAL LAWYERS

# Key takeaways re set-off under 553C

- Look first to 553C: Are there claims and are they mutual?
- As to the question of mutuality, ask “Can payments received (under the claim) be used for the party’s benefit?” – this will require consulting the terms of the security agreements and the contracts
- Did the person have notice that the company was insolvent? (s553C(2))
- If there’s no set-off available under s553C, are there alternative set-off claims under contract or equity?



## Section 553C in other circumstances

- Insolvent trading
- Unfair preference claims
- Uncommercial transactions



**Any questions?**



**VALENTI**  

---

COMMERCIAL LAWYERS



# CITY INSOLVENCY DISCUSSION GROUP

Next CIDG Session

**Wednesday, 5 December 2018**

**HLB Mann Judd**  
(Insolvency WA)  
Chartered Accountant

**GREGSONS**  
AUCTIONEERS & VALUERS

Willis **CKA**