JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	HAMERSLEY IRON PTY LTD -v- FORGE GROUP POWER PTY LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) [2018] WASCA 163
CORAM	**:**	MURPHY JA MITCHELL JA ALLANSON J
HEARD	**:**	21, 22 & 26 MARCH 2018
DELIVERED	**:**	21 SEPTEMBER 2018
FILE NO/S	**:**	CACV 72 of 2017
BETWEEN	**:**	HAMERSLEY IRON PTY LTD Appellant AND FORGE GROUP POWER PTY LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	TOTTLE J
Citation	**:**	HAMERSLEY IRON PTY LTD -v- FORGE GROUP POWER PTY LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) [2017] WASC 152
File Number	**:**	CIV 1245 of 2015

Catchwords:

Corporations - Insolvency - Statutory set-off - *Corporations Act 2001* (Cth) s 553C - Whether s 553C is an exclusive code regulating set-off in insolvency - Pari passu principle - Whether s 553C operated to the exclusion of any contractual or equitable rights of set-off available in insolvency - Whether set-off rights preserved in insolvency by *Personal Property Securities Act 2009* (Cth) (PPSA) s 80(1)

Transferee of an account - Whether PPSA s 80(1) applies to assignments by way of charge or only outright assignments

Floating charges - Equitable set-off - Crystallisation - General law - Circulating assets under PPSA - Control - Circulating security interests under *Corporations Act* ch 5

Personal Property Securities - PPSA - Where contractor has entered general security agreement with lender - Where lender has registered security agreement over contractor's personal property - Where contractor has gone into liquidation - Whether general security agreement effective according to its terms creating charge over claims to personal property - Whether attachment of a security interest destroys mutuality

Account under PPSA - Whether claim for wrongful call under guarantees provided by builder under building contract an 'account'
Contract - Construction contract - Interpretation - contractual right of deduction

Legislation:

Corporations Act 2001 (Cth), s 553C

Personal Property Securities Act 2009 (WA), s 12, s 18, s 19, s 20, s 32, s 79, s 80, s 81, s 254, s 338, s 339, s 340, s 341

Result:

Appeal allowed
Leave to appeal allowed

Category: A

Representation:

Counsel:

Appellant	:	Mr B Dharmananda SC & Mr D Jackson SC
Respondent	:	Mr SK Dharmananda SC, Mr R J Price & Ms L A Widdup

Solicitors:

Appellant	:	Holman Fenwick Willan (Perth)
Respondent	:	Clayton Utz

Case(s) referred to in decision(s):

Addis v Knight (1817) 2 Mer 117; 35 ER 885
Agnew v Commissioner of Inland Revenue [2001] 2 AC 710
Altarama v Camp (1980) 5 ACLR 513
Ansett Australia Ltd v Travel Software Solutions Pty Ltd [2007] VSC 326; (2007) 214 FLR 203
Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd [2000] HCA 25; (2000) 202 CLR 588
AWA Ltd v Exicom Australia Pty Ltd (1990) 19 NSWLR 705
Bailey v New South Wales Medical Defence Union Ltd [1995] HCA 28; (1995) 184 CLR 399
Baillie v Edwards (1848) 2 HL Cas 73; 9 ER 1020
Bank of Boston Connecticut v European Grain & Shipping Ltd [1989] AC 1056
Bank of Waunakee v Rochester Cheese Sales Inc, 906 F 2d 1185 (7th Cir, 1990)
Biggerstaff v Rowatt's Wharf Ltd [1896] 2 Ch 93
Brice v Bannister (1878) 3 QBD 569
British Eagle International Airlines Ltd v Compagnie Nationale Air France [1975] 1 WLR 748

Caltex Oil (Australia) Pty Ltd v Best [1990] HCA 53; (1990) 170 CLR 516
Citicorp Australia Ltd v Official Trustee in Bankruptcy (1996) 71 FCR 550
Clyne v Deputy Commissioner of Taxation [1981] HCA 40; (1981) 150 CLR 1
Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd [1995] 1 WLR 1140
Comptroller of Stamps (Victoria) v Howard-Smith [1936] HCA 12; (1936) 54 CLR 614
Coventry v Charter Pacific Corporation Ltd [2005] HCA 67; (2005) 227 CLR 234
Davies v Gertig (2003) 85 SASR 226
Davies v Gertig (No 2) [2002] SASC 257; (2002) 83 SASR 521
Day & Dent Constructions Pty Ltd (in liq) v North Australian Properties Pty Ltd (1981) 54 FLR 277
Day & Dent Constructions Pty Ltd (in liq) v North Australian Properties Pty Ltd [1982] HCA 20; (1982) 150 CLR 85
Dearle v Hall (1828) 3 Russ 1; 38 ER 475
Deputy Commissioner of Taxation v Lai Corporation Pty Ltd (receivers and managers appointed) [1987] WAR 15
Durham Brothers v Robertson [1898] 1 QB 765
Edward Nelson & Co Ltd v Faber & Co [1903] 2 KB 367
Equititrust Ltd v Franks [2009] NSWCA 128; (2009) 258 ALR 388
Ex parte Blagden (1815) 19 Ves Jun 465; (1815) 34 ER 589
Ex parte Cleland; In re Davies (1867) LR 2 Ch 808
Ex parte Stephens (1805) 11 Ves Jun 24; (1805) 32 ER 996
Felton v Mulligan (1971) 124 CLR 367
Ferrier v Bottomer [1972] HCA 11; (1972) 126 CLR 597
Fire Nymph Products Pty Ltd v Heating Centre Pty Ltd (in liq) (1992) 7 ACSR 365
Forster v Wilson (1843) 12 M & W 191; 152 ER 1165
G & M Aldridge Pty Ltd v Walsh [1999] VSCA 179; [1999] 3 VR 601
G M & A M Pearce and Co Pty Ltd v RGM Australia Pty Ltd [1998] 4 VR 888
George Barker Transport Ltd v Eynon [1974] 1 WLR 462
Golf Australia Holdings Ltd v Buxton Construction Pty Ltd [2007] VSCA 200
Gye v Davies (1995) 37 NSWLR 421
Gye v McIntyre [1991] HCA 60; (1991) 171 CLR 609
Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (receivers and managers appointed) [2017] WASC 152; (2017) 52 WAR 90
Handberg v Smarter Way (Aust) Pty Ltd [2002] FCA 469; (2002) 20 ACLC 856
Hazcor Pty Ltd v Kirwanon Pty Ltd (1995) 12 WAR 62
Hiley v People's Prudential Assurance Co Ltd (in liq) [1938] HCA 40; (1938) 60 CLR 468
Holroyd v Marshall (1862) 10 HL Cas 191; 11 ER 999
Hoverd Industries Ltd v Supercool Refrigeration & Air Conditioning (1991) Ltd [1995] 3 NZLR 577

In re City Life Assurance Co Ltd [1926] 1 Ch 191
In re Printz (2012) 478 BR 876
In re Spectrum Plus Ltd (in liq) [2005] 2 AC 680
International Air Transport Association v Ansett Australia Holdings Ltd [2008] HCA 3; (2008) 234 CLR 151
J & S Holdings Pty Ltd v NRMA Insurance Ltd (1982) 61 FLR 108
James v Commonwealth Bank of Australia (1992) 37 FCR 445
Krishell Pty Ltd v Nilant [2006] WASCA 223; (2006) 32 WAR 540
Landall Holdings Ltd v Caratti [1979] WAR 97
Lord v Direct Acceptance Corporation Ltd (receivers and managers appointed) (in liq) (1993) 32 NSWLR 362
Mangles v Dixon (1852) 3 HL Cas 702; 10 ER 278
Mathieson's Trustee v Burrup Mathieson & Co [1927] 1 Ch 562
McDonnell and East Ltd v McGregor (1936) 56 CLR 50
McIntyre v Gye (1994) 51 FCR 472
McIntyre v Perkes; McIntyre v Gye (1990) 22 FCR 260
Mine & Quarry Equipment International Ltd v McIntosh [2005] QCA 186; (2005) 54 ACSR 1
MS Fashions Ltd v Bank of Credit and Commerce International SA (in liq) [1993] Ch 425
Murphy v Zamonex Pty Ltd (1993) 31 NSWLR 439
N W Robbie & Co Ltd v Whitney Warehouse Co Ltd (1963) 1 WLR 324
Norman v Federal Commissioner of Taxation [1963] HCA 21; (1963) 109 CLR 9
Norman; Re Forest Enterprises Ltd v FEA Plantations Ltd [2011] FCAFC 99; (2011) 195 FCR 97
Northern Territory of Australia v Northern Land Council (1992) 81 NTR 1
Oswal v Commonwealth Bank of Australia [2013] WASCA 58
Paganini v The Official Assignee (Unreported, NZCA, 12 March 1999)
Palette Shoes Pty Ltd v Krohn [1937] HCA 37; (1937) 58 CLR 1
Piccone v Suncorp Metway Insurance Ltd [2005] FCAFC 260; (2005) 148 FCR 437
Popular Homes Ltd v Circuit Developments Ltd [1979] 2 NZLR 642
Qantas Airways Ltd v Gubbins (1992) 28 NSWLR 26
Re Anroma Pty Ltd [1987] 2 Qd R 134
Re Asiatic Electric Co Pty Ltd (in liq) [1970] 2 NSWR 612
Re Bank of Credit and Commerce International SA (No 8) [1996] Ch 245
Re Bank of Credit and Commerce International SA (No 8) [1998] AC 214
Re Diesels & Components Pty Ltd [1985] 2 Qd R 456
Re Harry Simpson & Co Pty Ltd and the Companies Act (1963) 81 WN (Pt 1) NSW 207
Re Langdon; Forge Group Limited (receivers and managers appointed) (in liq) [2017] FCA 170; (2017) 118 ACSR 434
Re Margart Pty Ltd (in liq) (1984) 9 ACLR 269

Re NIAA Corporation Ltd (in liq) (1993) 12 ACSR 141
Re Norman Holding Co Ltd (in liq) [1991] 1 WLR 10
Re Parker (1997) 80 FCR 1
Re SSSL Realisations (2002) Ltd (in liq) (2006) Ch 610
Re Trivan Pty Ltd (1996) 134 FLR 368
Redman v Permanent Trustee Co of New South Wales Ltd [1916] HCA 47; (1916) 22 CLR 84
Relwood Pty Ltd v Manning Homes Pty Ltd (No 2) [1992] 2 Qd R 197
Roadshow Entertainment Pty Ltd v (ACN 053006269) Pty Ltd (receiver and manager appointed) (1997) 42 NSWLR 462
Robertson v Grigg [1932] HCA 29; (1932) 47 CLR 257
Rother Iron Works Ltd v Canterbury Precision Engineers Ltd [1974] QB 1
Roxburghe v Cox (1887) 17 Ch D 520
Sheahan v Carrier Air Conditioning Pty Ltd [1997] HCA 37; (1997) 189 CLR 407
SL Sethia Liners Ltd v Naviagro Maritime Corporation (The 'Kostas Melas') [1981] 1 Lloyd's Rep 18
Smith v Perpetual Trustee Co Ltd [1910] HCA 39; (1910) 11 CLR 148
Southern British National Trust Ltd (in liq) v Pither [1937] HCA 28; (1937) 57 CLR 89
Stein v Blake [1995] 2 WLR 710
Stein v Saywell [1969] HCA 16; (1969) 121 CLR 529
Stoddart v Union Trust Ltd [1921] 1 KB 181
Strategic Finance Ltd (in rec and in liq) v Bridgman [2013] NZCA 357; (2013) 3 NZLR 650
Swiss Bank Corporation v Lloyd's Bank [1982] AC 584
The Government of Newfoundland v The Newfoundland Railway Co (1887) 13 App Cas 199
Thomas v National Australia Bank Ltd [1999] QCA 525; [2000] 2 Qd R 448
Tooth v Brisbane City Council [1928] HCA 20; (1928) 41 CLR 212
Torkington v Magee [1902] 2 KB 427
United States Trust Co of New York v Australia and New Zealand Banking Group Ltd (1995) 37 NSWLR 131
United Travel Agencies Pty Ltd v Cain (1990) 20 NSWLR 566
Walker v Secretary, Department of Social Security (1995) 56 FCR 354
Westfield Management Ltd v AMP Capital Property Nominees Ltd [2012] HCA 54; (2012) 247 CLR 129
Westmex Operations Pty Ltd (in liq) v Westmex Ltd (in liq) (1994) 12 ACLC 106
Wily v St George Partnership Banking Ltd [1999] FCA 33; (1999) 84 FCR 423
Zheng v Cai [2009] HCA 52; (2009) 239 CLR 446

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JUDGMENT OF THE COURT:

Introduction

1 This is an appeal against a decision of the primary judge,[1] concerning certain claims by the appellant (Hamersley Iron Pty Ltd (Hamersley)), against the respondent (Forge Group Power Pty Ltd (in liquidation) (receivers and managers appointed) (Forge)). The dispute is essentially between Hamersley and Forge's receivers and managers (Receivers).

2 In broad terms, in 2012 Hamersley (as principal) engaged Forge (as builder) to carry out certain works in relation to the construction of power stations at West Angelas and Cape Lambert (collectively, Contracts). In or about 2013, Forge obtained funding from a bank, and granted to the bank certain security over its personal property. The bank registered the charge pursuant to the *Personal Property Securities Act 2009* (Cth) (PPSA) on 2 July 2013. In 2014, the bank appointed Receivers to Forge, and Forge subsequently went into liquidation. Disputes arose involving claims by Hamersley against Forge, and claims by Forge against Hamersley.[2]

3 Hamersley alleged that its claims against Forge exceeded the claims Forge had against it, and that it was entitled to set-off its claims against Forge's claims, and prove for the balance in the liquidation of Forge.[3] Hamersley relied on contractual rights of deduction under the Contracts, equitable set-off, and/or alternatively, set-off in insolvency pursuant to s 553C of the *Corporations Act 2001* (Cth).

4 Forge, by its Receivers, alleged that Hamersley has no entitlement to deduction or set-off. The Receivers contended, in effect, that once liquidation supervened, there was no right of set-off other than under s 553C of the *Corporations Act*, and s 553C had no application in the circumstances.

5 In broad terms, the Receivers contended, first, that mutuality under s 553C was determined by reference to equitable interests and secondly, that there was no mutuality because the equitable interest in Forge's

[1] ***Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (receivers and managers appointed)*** [2017] WASC 152; (2017) 52 WAR 90 (primary decision).
[2] Primary decision [11] - [21].
[3] Primary decision [2].

claims against Hamersley subsisted in the bank, by virtue of the operation of the PPSA, as from 2 July 2013.

6 The Receivers accordingly contended that Hamersley was obliged to pay the Receivers the debts and other monies due to Forge, effectively for the benefit of the bank, and that Hamersley was left to prove in the liquidation of Forge for the whole of its claims, without the benefit of any set-off.[4]

7 The primary judge upheld Forge's contentions in a trial of preliminary issues, in which there was an agreed statement of facts. Hamersley challenges that decision. The decision is interlocutory and leave to appeal is required.[5]

8 For the reasons which follow, leave should be granted and the appeal should be upheld. In broad summary:

1. Section 553C of the *Corporations Act* applied and provided for Hamersley's claims to be set-off against Forge's claims, and for the balance to be admissible to proof against Forge. As at the commencement of the winding up of Forge in insolvency, the relevant dealings between Hamersley and Forge under the Contracts were mutual dealings for the purposes of s 553C. That is on the basis that, at that time, Forge retained the right to use amounts paid by Hamersley to Forge under the Contracts for Forge's own benefit. Section 553C operated to the exclusion of any contractual or equitable rights of set-off which Hamersley had prior to the commencement of the winding up of Forge.[6]

2. Alternatively, if s 553C did not apply because the amounts due by Hamersley to Forge under the Contracts were payable for the benefit of the bank rather than the benefit of Forge, then s 553C does not preclude Hamersley from asserting any available contractual or equitable rights of set-off in recovery proceedings brought for the benefit of the bank as secured party.[7]

3. The rights of the bank (as the transferee of an account) in relation to Forge's claims against Hamersley are subject to the terms of the Contracts and any equity, defence, remedy or claim arising in

[4] Primary decision [3].
[5] *Supreme Court Act 1935* (WA) s 60(1)(f).
[6] See [65] - [138] and [250] below.
[7] See [139] - [177] below.

relation to the Contracts (including a defence by way of a right of set-off), pursuant to s 80(1)(a) of the PPSA.[8]

Background[9]

The Contracts - 2011/2012

9 On or about 11 February 2012, Hamersley and Forge entered into a written lump sum contract pursuant to which Forge agreed to perform the engineering, procurement and construction of the West Angelas Power Station (West Angelas Contract).[10]

10 The West Angelas Contract included a Formal Instrument of Agreement and a schedule incorporating General Conditions of Contract (GCs).[11]

11 On or about 2 November 2011, Forge commenced work under the West Angelas Contract.[12]

12 On or about 28 August 2012, Hamersley and Forge entered into a written lump sum contract pursuant to which Forge agreed to perform the engineering, procurement and construction of the Cape Lambert Power Station (Cape Lambert Contract).[13]

13 The Cape Lambert Contract also included a Formal Instrument of Agreement and General Conditions, which were in materially identical terms to the GCs in the West Angelas Contract.[14]

14 On or about 3 September 2012, Forge commenced work under the Cape Lambert Contract.[15]

Forge's security arrangements - July 2013/January 2014

15 On or about 2 July 2013, Forge entered into:

[8] See [178] - [232] below.
[9] The following is taken from the 'Agreed statement of facts' filed in the primary proceedings, unless otherwise indicated.
[10] Agreed statement of facts, par 1; GB 1A.
[11] Amended statement of claim dated 19 February 2016, par 9; BB 124 - 125; amended defence and counterclaim dated 12 April 2016, par 9; BB 149.
[12] Agreement statement of facts, par 2; GB 1A.
[13] Agreed statement of facts, par 3; GB 1B; primary decision [11].
[14] Primary decision [11], [21]; amended statement of claim, par 34; BB 138; amended defence and counterclaim, par 34; BB 167.
[15] Agreed statement of facts, par 4; GB 1B; primary decision [12].

1. a facility agreement with Australia and New Zealand Banking Group Limited (the bank);

2. a General Security Agreement (GSA) with the bank and ANZ Fiduciary Services Pty Ltd as trustee of the Forge Security Trust (ANZFS); and

3. a Common Terms Deed with the bank and ANZFS.

16 Also on 2 July 2013, the GSA was registered on the Personal Property Securities Register.[16]

17 On 28 January 2014, Forge entered into a Second Deed of Amendment and Restatement of the Common Terms Deed,[17] and Deed of Amendment and Restatement of the Security Trust Deed.[18]

Insolvency appointments to Forge and termination of contracts - February/March 2014

18 On 11 February 2014, the directors of Forge resolved to appoint voluntary administrators to Forge pursuant to s 436A of the *Corporations Act*. It was common ground on the pleadings that the Contracts provided that the appointment of voluntary administrators constituted an 'Event of Insolvency' for the purposes of the Contracts.[19]

19 On 11 February 2014, after the appointment of the voluntary administrators, ANZFS appointed the Receivers of Forge pursuant to the GSA.[20]

20 On 12 February 2014, Forge terminated the employment of employees who had been performing the work under the Contracts.[21]

21 Also on 12 February 2014, the Receivers sent a letter to the creditors of Forge stating, amongst other things that the Receivers had not adopted any of Forge's contracts.[22]

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[16] Agreed statement of facts, par 7; GB 1B.
[17] GB 883.
[18] GB 1090.
[19] Amended statement of claim, par 10(a)(vi); BB 126; amended defence and counterclaim, par 10(a)(vi); BB 149.
[20] Agreed statement of facts, par 11; GB 1B.
[21] Amended statement of claim, pars 12, 37; BB 132, 139; amended defence and counterclaim, par 12(a)(i); BB 158.
[22] Amended statement of claim, pars 12, 37; BB 132, 139; amended defence and counterclaim, par 12(a)(ii); BB 158; GB 1199.

22 On 24 February 2014, each of the Contracts came to an end.[23]

23 On 18 March 2014, Forge's creditors resolved that Forge be wound up and that the voluntary administrators be appointed the liquidators of Forge.[24]

24 The winding up of Forge is taken to have commenced on 11 February 2014.[25]

The parties' pleaded claims[26]

Hamersley's claims against Forge

25 Hamersley's claims against Forge are as follows:

West Angelas

1. Liquidated damages of $12,195,000 under the West Angelas Contract in respect of the failure to meet contracted Completion Dates for six different 'Separable Portions' which had Completion Dates ranging between 1 November 2012 and 1 October 2013 which, as at 11 February 2014, had not been completed.[27]

2. Damages for repudiation and breach of the West Angelas Contract in respect of additional costs to complete the works of $114,820,000, ie, the amount that Hamersley has paid or will have to pay to complete the works under the Contract, less the amount that it would have paid to Forge had Forge completed the work in accordance with the Contract.[28]

3. Hamersley's claims of $12,195,000 and $114,820,000 are reduced to $111,775,000 by reason of Hamersley having realised performance securities in the sum of $15,240,000.[29]

Cape Lambert

4. Damages for repudiation and breach of the Cape Lambert Contract in respect of additional costs to complete the works of

[23] Primary decision [17].
[24] Agreed statement of facts, par 10; GB 1B; primary decision [18].
[25] Amended statement of claim, par 57; BB 144; amended defence and counterclaim, par 57; BB 181.
[26] See the agreed document entitled 'Summary of claims in the amended statement of claim of 19 February 2016 and the defence and counterclaim of 12 April 2016' handed up by consent at the hearing of the appeal. See also primary decision [38] - [40].
[27] Amended statement of claim, par 17; BB 133.
[28] Amended statement of claim, par 19; BB 134.
[29] Amended statement of claim, par 20; BB 134.

$120,710,000, ie, the amount that Hamersley has paid or will have to pay to complete the work under the Contract, less the amount that it would have paid to Forge had Forge completed the work in accordance with the Contract.[30]

5. Hamersley's claim of $120,710,000 is reduced to $73,380,000 by reason of Hamersley having realised performance securities in the sum of $47,330,000.[31]

Forge's claims against Hamersley

26 On 12 September 2014, Forge by its Receivers claimed certain amounts from Hamersley in respect of the Contracts.[32] Forge characterised its claims as falling within three broad categories:[33]

1. 'Payment Certificate Claims' - claims for amounts certified for payment by Hamersley by the West Angelas Payment Certificate and the Cape Lambert Payment Certificate.

2. 'Progress Claims' - specific amounts Forge claimed were due to it for work done, but which had not been certified for payment.

3. 'Securities Claims' - claims arising from securities which Forge alleged were wrongfully drawn down by Hamersley.

27 More particularly, Forge's claims against Hamersley are as follows:[34]

West Angelas

1. The sum of $458,190.50 certified for payment pursuant to the West Angelas Payment Certificate issued by Hamersley on 28 January 2014 (less than 15 business days before 11 February 2014), which was not paid.[35]

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[30] Amended statement of claim, par 41; BB 140.
[31] Amended statement of claim, par 42; BB 141.
[32] Amended statement of claim, pars 23, 45; BB 135, 141; amended defence and counterclaim, pars 23, 45; BB 164, 176; primary decision [69]. See also the agreed document entitled 'Summary of claims in the amended statement of claim of 19 February 2016 and the defence and counterclaim of 12 April 2016' handed up by consent at the hearing of the appeal. That document, at par 17, refers also to a sum of $3,852,726.11 claimed by Forge for additional amounts said to be due under the Cape Lambert Contract for work performed before 11 February 2014, but not certified. The primary judge appears to make no reference to this in primary decision [69].
[33] Primary decision [262].
[34] Primary decision [69].
[35] Amended statement of claim, par 23(b)(i); BB 135; amended defence and counterclaim, pars 11(a)(iv)(d), 11(a)(iv)(e), 23(b)(i); BB 157 - 158, 164.

2. Further amounts totalling $7,019,752.17 which the Receivers claimed were due to Forge under the West Angelas Contract for work performed before 11 February 2014 (but not certified).[36]

3. Amounts of $9,224,372.10 and US$5,440,160.40 realised by Hamersley in respect of (alleged) wrongful calls on performance securities under the West Angelas Contract.[37]

Cape Lambert

4. The sum of $1,283,559.61 certified for payment pursuant to the Cape Lambert Payment Certificate issued by Hamersley on 30 January 2014 (less than 15 business days before 11 February 2014).[38]

5. The amount of $8,577,829.63 for works claimed in respect of a progress claim issued by Forge on 6 February 2014 (but not certified).[39]

6. Amounts of $25,933,287.00 and US$19,335,939.00 realised by Hamersley on or about 18 February 2014 by (alleged) wrongful calls on performance securities under the Cape Lambert Contract.[40]

The pleas with respect to set-off

28 Hamersley pleaded, amongst other things:

1. Contractual rights to deduction.[41]

2. Equitable set-off.[42]

3. Set-off under s 553C of the *Corporations Act*.[43]

29 The Receivers pleaded, in effect, that some or all of the following matters precluded Hamersley from deducting or setting-off its claims against Forge's claims:[44]

[36] Amended defence and counterclaim, par 23(b)(ii); BB 165.
[37] Amended defence and counterclaim, par 23(b)(iii); BB 165.
[38] Amended statement of claim, par 45(b)(i); BB 142; amended defence and counterclaim, par 45(b)(i); BB 176.
[39] Amended defence and counterclaim, par 45(b)(ii); BB 176 - 177.
[40] Amended defence and counterclaim, pars 42(b)(i), 42(b)(ii), 45(b)(iv); BB 173 - 174, 177.
[41] Amended statement of claim, pars 10(q), 31, 35(c), 53; BB 129 - 130, 137, 139, 143.
[42] Amended statement of claim, pars 32, 54; BB 138, 144; primary decision [43].
[43] Amended statement of claim, pars 55 - 59; BB 144 - 145.
[44] Primary decision [73].

1. Section 553C is a mandatory and exclusive code by reason of which the contractual deduction provisions in the Contracts are unenforceable, and equitable set-off is unavailable.[45]

2. Section 553C, which exclusively governs set-off, is not applicable because of an absence of mutuality, in that:[46]

   (a) the charge created under the GSA is, and was at all material times, a security interest that had attached to the Collateral (as defined in the GSA), and, or alternatively;

   (b) the charge created pursuant to the GSA is, and was at all material times, a fixed charge; and

   (c) as a result, immediately on the creation of the GSA or at the time of attachment (being at the time the rights arose), Forge's claims or choses in action under the Contracts were not held by Forge as beneficial holder, or in the same interest as Hamersley.

Forge's prayer for relief

30 The primary judge summarised Forge's counterclaim for declaratory relief to the following effect:[47]

> (i) s 553C of the *Corporations Act* is a mandatory and exclusive code as to set-off between an insolvent company and its creditors that took effect in this case from 11 February 2014;
>
> (ii) the contractual set-off provisions do not apply in the face of the operation of s 553C;
>
> (iii) Hamersley is not entitled to deduct or otherwise set off from monies otherwise due to Forge under the Contracts any debt or other monies due or any Claim to money it may have against Forge under or in connection with the Contracts by reason of an absence of mutuality; and
>
> (iv) Forge is entitled to the amounts admitted by Hamersley as being owed to Forge.
>
> In addition Forge seeks an account in respect of each of the securities realised by Hamersley.

[45] Amended defence and counterclaim, pars 10(q)(ii), 10(t), 24(c), 29(a), 31(a), 35(a)(iii), 46(c), 51(a), 53(b); BB 154, 156, 166 - 168, 178; primary decision [46].
[46] Amended defence and counterclaim, pars 56 - 58; BB 179 - 881.
[47] Primary decision [71] - [72].

The preliminary questions and the answers given by the primary judge

31 The preliminary questions were to the following effect:[48]

1. Assuming that Hamersley is otherwise entitled to the set-offs it has pleaded, do any of the matters pleaded by Forge (summarised in [30] above), together or separately, preclude Hamersley from setting off its claims against Forge's claims?

2. Is Hamersley entitled to set-off its claims against Forge's claims?

32 The primary judge determined the preliminary questions on the assumed and agreed basis that each party was entitled to the loss and damage it pleaded against the other.[49]

33 The primary judge answered the first question in the affirmative and the second in the negative.[50]

Grounds of Appeal

34 Hamersley alleged that the primary judge erred in law in:

1. holding that the 'Collateral' the subject of the GSA included the sums claimed by Forge as distinct from the balance, if any, after taking into account the sums claimed by Hamersley;

2. his treatment of s 80(1)(a) of the PPSA:

   (a) in concluding that Hamersley could not invoke s 80(1)(a) against the rights of the bank and the Receivers;

   (b) in concluding that s 80(1)(a) does not operate to make any right of the bank to make claims under the Contracts subject to the terms of those Contracts, and any equity, defence (including by way of set-off), remedy or claim of Hamersley arising in relation to the Contracts, and further, in concluding that s 80(1)(a) does not apply in the liquidation of Forge; and

   (c) in failing to find that s 80(1)(a) applied to ensure that mutuality remained as between Forge's claims for payment under the Contracts and Hamersley's claims for

[48] Primary decision [73].
[49] Primary decision [74].
[50] Primary decision [405] - [407].

breaches of the Contracts, despite the creation of a security interest in favour of the bank;

3. concluding that the Securities Claims were not 'accounts' within the meaning of the PPSA, and thus subject to the operation of s 80(1)(a) of the PPSA;

4. his treatment of s 553C of the *Corporations Act*:

   (a) in concluding that s 553C is an exclusive code, and:

      (i) that it applies to the exclusion of s 80(1)(a) of the PPSA; and

      (ii) that it leaves no room for any other basis for set-off;

   (b) in concluding that, for the purposes of s 553C there was no mutuality between Forge's claims for payment under the Contracts and Hamersley's claims for damages for breaches of the Contracts; and

   (c) in failing to conclude that s 553C does not operate in relation to property the subject of the bank's security interest and, in its place, s 80(1)(a) of the PPSA operates so that Hamersley as an account debtor could rely on the contractual set-off provisions of the Contracts;

5. further, or alternatively, in concluding that:

   (a) section 19 of the PPSA resulted in there being no mutuality of interest for the purposes of the application of s 553C of the *Corporations Act*; and

   (b) the existence of the GSA prevented the application of s 553C.

Respondent's notice of contention

35 The Receivers contend that if Hamersley succeeds in any of grounds 2, 3 or 4, the primary judge's answers to each of the preliminary questions should be upheld on the basis that s 80 of the PPSA does not apply to Hamersley's contractual set-off rights as, on the proper construction of s 80 in the context of the PPSA as a whole, s 80 applies only to 'rights of a transferee of an account or chattel paper' and the GSA

did not effect a transfer of an 'account' to the bank, nor a transfer of chattel paper.[51]

General law observations

36 The parties approached the issues of the proper construction of the PPSA, and the *Corporations Act*, on the basis that the statutory instruments were to be construed in the context of the general law background including as to assignments, equitable set-off and the general law distinction between fixed and floating charges.

37 The following general observations may be made as to the position under the general law. They are not intended to be exhaustive, but rather sufficient for the purposes of the discussion of the issues raised in connection with the preliminary questions the subject of this appeal.

Assignments

38 Forge's claims against Hamersley are legal choses in action.[52] Historically, legal choses in action were not directly assignable at law prior to the enactment of s 25(6) of the *Judicature Act 1873* (UK) (*Judicature Act*).[53] Prior to then, legal choses in action were only assignable in or with the assistance of equity.[54]

39 An assignment in equity depends upon there being a sufficient expression of an immediate intention by the assignor to impart the assignor's interest in the property, or some lesser interest carved out of it, to the assignee.[55]

40 As between assignor and assignee, an equitable assignment of the chose in action (unlike a legal assignment at law)[56] is effective without notice being given to the debtor/obligor.[57]

41 However, from the assignee's point of view, the purpose of giving notice of the assignment to the debtor/obligor is, first, to bind the

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[51] Respondent's notice of contention, pars 1 - 2; WB 56 (noting that this ground was not subject to argument before the primary judge, but contending that it is purely one of construction and so it is appropriate for it to be considered on appeal in the interests of justice).
[52] ***Torkington v Magee*** [1902] 2 KB 427.
[53] In this State, see *Property Law Act 1969* (WA) s 20.
[54] ***Norman v Federal Commissioner of Taxation*** [1963] HCA 21; (1963) 109 CLR 9, 26 - 27.
[55] ***Comptroller of Stamps (Victoria) v Howard-Smith*** [1936] HCA 12; (1936) 54 CLR 614, 622 - 624; ***Smith v Perpetual Trustee Co Ltd*** [1910] HCA 39; (1910) 11 CLR 148, 158 - 159; ***Norman*** (26).
[56] See, eg, in this State, *Property Law Act 1969* (WA) s 20.
[57] ***Howard-Smith*** (622); ***Hiley v People's Prudential Assurance Co Ltd (in liq)*** [1938] HCA 40; (1938) 60 CLR 468, 503 - 504; ***McIntyre v Gye*** (1994) 51 FCR 472, 479; Heydon JD, Leeming MJ and Turner PG, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (5th ed, 2015) [6-430].

conscience of the debtor/obligor to require payment to the assignee - otherwise the assignee would be bound by any payments made by the debtor/obligor to the assignor[58] and secondly, to preserve its priority against other assignees of the chose in action.[59]

42 The assignee of a chose in action takes the chose (or the equitable interest in the chose),[60] subject to all the 'equities' that the debtor/obligor has against the assignor at the time of notice of the assignment, and subject also to all the infirmities and defects in the title of the assignor.[61] It is a paramount rule that the assignee takes subject to the infirmities of his or her assignor's title.[62]

43 The word 'equities' has a wide meaning in this context and it is not used in its technical sense.[63] It is a general expression calculated to comprehend defences which would have been available to the debtor/obligor in an action brought against the debtor/obligor by the assignor, as well as set-off and counterclaims.[64]

44 The assignee takes subject to any defence or set-off available to the debtor/obligor at the time when notice of the assignment is given, unless the right of set-off is excluded by agreement between the assignor and the debtor/obligor.[65]

45 Further, claims that flow out of, and are inseparably connected with, the obligation the benefit of which is assigned, and do not involve any fresh transaction entered into by the assignor after notice of the assignment, may also be set-off in equity against the assignee, at least insofar as they impeach the assignee's title.[66]

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[58] ***Tooth v Brisbane City Council*** [1928] HCA 20; (1928) 41 CLR 212, 222 - 224.
[59] ***Howard-Smith*** (622); ***Thomas v National Australia Bank Ltd*** [1999] QCA 525; [2000] 2 Qd R 448, 455; ***Dearle v Hall*** (1828) 3 Russ 1; 38 ER 475.
[60] Edelman JJ and Elliot S, Two Conceptions of Equitable Assignment (2015) 131 *Law Quarterly Review* 228.
[61] ***Clyne v Deputy Commissioner of Taxation*** [1981] HCA 40; (1981) 150 CLR 1, 20 - 21; ***Southern British National Trust Ltd (in liq) v Pither*** [1937] HCA 28; (1937) 57 CLR 89, 110; ***Redman v Permanent Trustee Co of New South Wales Ltd*** [1916] HCA 47; (1916) 22 CLR 84, 91 - 92; ***Re Harry Simpson & Co Pty Ltd and the Companies Act*** (1963) 81 WN (Pt 1) NSW 207, 209; ***Edward Nelson & Co Ltd v Faber & Co*** [1903] 2 KB 367, 375; ***Roxburghe v Cox*** (1881) 17 Ch D 520, 526; ***Mangles v Dixon*** (1852) 3 HL Cas 702; 10 ER 278, 731.
[62] ***Redman*** (92); ***Clyne*** (20).
[63] ***Clyne*** (20); ***Simpson*** (209).
[64] ***Clyne*** (20).
[65] ***Clyne*** (20 - 21).
[66] ***The Government of Newfoundland v The Newfoundland Railway Co*** (1888) 13 App Cas 199, 210, 212 - 213, referred to with evident approval by Isaacs J in ***Tooth*** (223); ***Roadshow Entertainment Pty Ltd v (ACN 053006269) Pty Ltd (receiver and manager appointed)*** (1997) 42 NSWLR 462; ***Altarama v Camp*** (1980) 5 ACLR 513, 519 - 520; see also ***Stoddart v Union Trust Ltd*** [1921] 1 KB 181, 188 - 189; *Meagher,*

46 Successive equitable assigns of an interest in personal property are governed by the particular rule in ***Dearle v Hall***.[67]

47 Future property, or an 'expectancy', is not property. It cannot, therefore, be assigned at law, and can only be assigned in equity for consideration.[68] Providing the consideration has been paid or executed, an equitable interest in the property vests in the assignee when the property is acquired by the assignor, and it is ascertained or identifiable.[69] If a company agrees to assign for executed consideration, future property and, before it acquires that property, is wound up, the subsequent acquisition of the property and its vesting in the assignee is not a 'disposition of property of the company' for the purposes of s 468(1) of the *Corporations Act*.[70]

Equitable set-off

48 Equitable set-off includes what has been described as substantive equitable set-off, where the party seeking the benefit of the set-off can show some equitable ground for being protected against the claimant's demand.[71] Australian law in this regard has generally emphasised that the relevant equity must be of a character which impeaches the title to the claimant's demand.[72] To that extent, there must be a connection between the two cross-demands (which is not a requirement of legal set-off). On the other hand, equitable set-off does not insist upon mutuality and it applies to both liquidated and unliquidated demands.[73]

Gummow & Lehane [6-500]. In ***McDonnell and East Ltd v McGregor*** (1936) 56 CLR 50, 59 - 60, Dixon J treated ***Newfoundland*** as a case dealing with the question of whether an assignee of the contract could recover moneys arising under it without being met by a *counterclaim*, for breaches by the assignor of the same contract, rather than as a case of set-off. See also ***James v Commonwealth Bank of Australia*** (1992) 37 FCR 445, 461 - 462; cf ***Bank of Boston Connecticut v European Grain & Shipping Ltd*** [1989] AC 1056, 1110 - 1111. See also Derham R, *Derham on the Law of Set-Off* (4th ed, 2010) [17.32].

[67] ***Dearle v Hall*** (1828) 3 Russ 1; 38 ER 475; see also *Meagher, Gummow & Lehane* [8-100] - [8-215].

[68] *Meagher, Gummow & Lehane* [6-195].

[69] ***Holroyd v Marshall*** (1862) 10 HL Cas 191; 11 ER 999; ***Palette Shoes Pty Ltd v Krohn*** [1937] HCA 37; (1937) 58 CLR 1, 27.

[70] ***Re Anroma Pty Ltd*** [1987] 2 Qd R 134; *Meagher, Gummow and Lehane* [6-320].

[71] ***J & S Holdings Pty Ltd v NRMA Insurance Ltd*** (1982) 61 FLR 108, 127; *Meagher, Gummow & Lehane* [39-050(d)] - [39.055].

[72] ***James***; ***Lord v Direct Acceptance Corporation Ltd (receivers and managers appointed) (in liq)*** (1993) 32 NSWLR 362, 367; ***Hazcor Pty Ltd v Kirwanon Pty Ltd*** (1995) 12 WAR 62, 67; ***Walker v Secretary, Department of Social Security*** (1995) 56 FCR 354, 375; ***Roadshow Entertainment*** (481); ***Oswal v Commonwealth Bank of Australia*** [2013] WASCA 58 [11]; ***Norman; Re Forest Enterprises Ltd v FEA Plantations Ltd*** [2011] FCAFC 99; (2011) 195 FCR 97 [135] - [163]; ***Equititrust Ltd v Franks*** [2009] NSWCA 128; (2009) 258 ALR 388 [61].

[73] ***Murphy v Zamonex Pty Ltd*** (1993) 31 NSWLR 439, 464 - 465; *Meagher, Gummow & Lehane* [39-060]; *Derham* [4.67] - [4.83].

Charges

49 In general terms, the essence of an equitable charge is a proprietary interest granted by way of security, without any transfer of title (outright title as opposed to an equitable interest), or possession, to the chargee.[74] Specific property of the chargor is expressly or constructively appropriated to, or made answerable for, the payment of a debt or other obligation.[75] The chargee is given the right to resort to that property for the purposes of having it realised and applied in or towards the payment of the debt.[76] Thus, the equitable chargee (unlike the beneficiary of a trust) has remedies against the property itself, and not against the holder of the property.[77]

50 A charge has been treated as, or equivalent to (at least for a number of purposes), a partial assignment of a chose in action - partial to the extent of the debt secured by the charge.[78] An assignment by way of a charge is effective only in equity.[79] An equitable chargee of a chose in action is in no better position than an equitable assignee so far as the chargee takes subject to the equities.[80]

Floating charges

51 Floating charges are founded in contract, and their legal effect derives from the agreement between the parties.[81]

52 The nature of the charge is not finally determined by what the parties call it. Accordingly, labels such as 'fixed' or 'specific' cannot be

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[74] ***Re Bank of Credit and Commerce International SA (No 8)*** [1998] AC 214, 226 (***BCCI No 8*** **Lords**).
[75] ***Sheahan v Carrier Air Conditioning Pty Ltd*** [1997] HCA 37; (1997) 189 CLR 407, 422 - 423; ***Robertson v Grigg*** [1932] HCA 29; (1932) 47 CLR 257, 270 - 271.
[76] ***Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd*** [2000] HCA 25; (2000) 202 CLR 588 [6]. See also ***Swiss Bank Corporation v Lloyd's Bank Ltd*** [1982] AC 584, 594 - 595; ***United Travel Agencies Pty Ltd v Cain*** (1990) 20 NSWLR 566, 569 - 570.
[77] Heydon JD and Leeming MJ, *Jacobs' Law of Trusts in Australia* (8th ed, 2016) [2.26] - [2.27].
[78] ***Durham Brothers v Robertson*** [1898] 1 QB 765, 769; ***Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd*** [1995] 1 WLR 1140, 1144; ***G & M Aldridge Pty Ltd v Walsh*** [1999] VSCA 179; [1999] 3 VR 601 [26]. See also ***Grigg*** (265) and ***Bailey v New South Wales Medical Defence Union Ltd*** [1995] HCA 28; (1995) 184 CLR 399, 445 - 446; *Meagher, Gummow & Lehane* [6-065]. Cf Sykes EI and Walker S, *The Law of Securities* (5th ed, 1993) 17 - 20; Turner PG, 'Assignment By Way of Charge' (2004) 24 *Australian Bar Review* 280.
[79] ***Bailey*** (446).
[80] ***Rother Iron Works Ltd v Canterbury Precision Engineers Ltd*** [1974] QB 1, 5 - 6; ***George Barker (Transport) Ltd v Eynon*** [1974] 1 WLR 462, 467 - 468, 473, 475; ***Re Diesels & Components Pty Ltd*** [1985] 2 Qd R 456, 461; ***Roadshow Entertainment*** (483); and see generally, *Meagher, Gummow & Lehane* [29-205].
[81] ***Fire Nymph Products Pty Ltd v Heating Centre Pty Ltd (in liq)*** (1992) 7 ACSR 365, 371.

decisive if the rights created by the charge, properly construed, are inconsistent with that label.[82]

53 A creditor who accepts a floating charge over a company's assets allows the business of the company to be carried on and the assets of the company which are subject to the floating charge to be altered by the efforts of the company and its employees.[83] The distinguishing feature of a floating charge is that, given that the class of present and future assets that are charged are such as in the ordinary course of the company's business would be changing from time to time, the company is left at liberty, until one of the 'crystallising' events happens, to dispose freely, in the ordinary course of its business, of any property to which the charge attaches.[84] Until then, the chargor is left free to use the charged asset and to remove it from the security. The asset the subject of the floating charge is not finally 'appropriated' until then.[85] The property charged remains 'liquid' until then.[86]

54 Even if the charge purports to be a fixed charge over present and future book debts and contains restrictions on the chargor creating further charges over its debts or assigning or factoring them, if the chargor is left free to continue to collect the debts and use the proceeds without the consent of the chargee, the charge will ordinarily be construed as operating as a floating charge over uncollected debts as at the date of crystallisation.[87] On the other hand, if, for example, the charge provides for the company to collect the debts as agent for the chargee and pay them into an account which is 'blocked' from use by the chargor without the consent of the chargee, and the account is operated in that way, the arrangement is not consistent with a floating charge.[88]

55 The essence of crystallisation is that the charge becomes fixed upon certain specific property, and the chargor's right as against the chargee to dispose of the property comes to an end.[89]

56 The question of whether a floating chargee has a proprietary interest in the charged assets prior to crystallisation has been the subject

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[82] ***Deputy Commissioner of Taxation v Lai Corporation Pty Ltd (receivers and managers appointed)*** [1987] WAR 15, 25, 45; ***In re Spectrum Plus Ltd (in liq)*** [2005] 2 AC 680 [141].
[83] ***Stein v Saywell*** [1969] HCA 16; (1969) 121 CLR 529, 544.
[84] ***Stein*** (556). See also ***Lai*** (23 - 24), (53 - 54); ***Fire Nymph*** (370 - 371).
[85] ***In re Spectrum*** [111].
[86] ***Ferrier v Bottomer*** [1972] HCA 11; (1972) 126 CLR 597, 609.
[87] ***Agnew v Commissioner of Inland Revenue*** [2001] 2 AC 710 [17] - [18], [24], [27] - [36], [45] - [49]; ***In re Spectrum*** [105] - [111], [140], [147] - [155].
[88] ***Agnew*** [48]; ***In re Spectrum*** [140].
[89] ***Fire Nymph*** (373); ***Relwood Pty Ltd v Manning Homes Pty Ltd (No 2)*** [1992] 2 Qd R 197, 201.

of considerable debate.[90] One line of authority is to the effect that a floating chargee, even prior to crystallisation, has a proprietary or equitable interest in the property charged, coupled with an implied licence to deal with the assets free of the charge in order to carry on its business until the charge is crystallised.[91] Other authorities have described a floating charge as operating as an 'incomplete [equitable] assignment', which, upon crystallisation, becomes 'converted into a completed equitable assignment … of the assets charged'.[92] Professor Worthington has observed that 'any theory describing the floating chargee's proprietary interest prior to crystallisation of the charge simply enables the rational resolution of a separate problem, the priority disputes between competing proprietary interest holders'.[93]

57 Whatever may be the true character of the floating chargee's interest prior to crystallisation, importantly for present purposes, any right of set-off (legal or equitable) accruing between the company and its debtor or creditor prior to crystallisation is not destroyed by the crystallisation, and may be asserted by or against the receiver as the case may be. That is so even if the claim the subject of the asserted set-off is only brought after crystallisation, and even if the party asserting the set-off had prior notice of the floating charge and its potential to effect, at some future time, an assignment to the chargee.[94] The parties in this case accepted that a fixed charge, on the other hand, would preclude the application of insolvency set-off under s 553C of the *Corporations Act*. After the charge becomes fixed, there is an absence of mutuality for the purposes of insolvency set-off.[95]

58 Equity may also, in effect, restrain the exercise of the right of legal set-off after crystallisation. Thus, equity may not permit a pre-crystallisation debt owed by a company (first debt) to be set-off against a post-crystallisation receivable of the company (second debt).[96] The better view is that that result does not follow because of an absence of mutuality on the basis that the second debt is beneficially owned by the secured creditor. Rather, in such a case, whilst there is, undoubtedly,

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[90] Many of the arguments are canvassed in Sheehan D, *The Principles of Personal Property Law* (2nd ed, 2017) 355 - 360.
[91] ***Wily v St George Partnership Banking Ltd*** [1999] FCA 33; (1999) 84 FCR 423, 430 - 434. See also ***Re Margart Pty Ltd (in liq)*** (1984) 9 ACLR 269, 272 (a 'beneficial interest in the property the subject of the charge'); ***Landall Holdings Ltd v Caratti*** [1979] WAR 97, 106 - 108.
[92] ***Hoverd Industries Ltd v Supercool Refrigeration and Air Conditioning (1991) Ltd*** [1995] 3 NZLR 577, 587; ***Eynon*** (467).
[93] Worthington S, *Proprietary Interests in Commercial Transactions* (Claredon Press, 1996) 81 - 82.
[94] ***Biggerstaff v Rowatt's Wharf Ltd*** [1896] 2 Ch 93; *Meagher, Gummow & Lehane* [29-210].
[95] ***Re Parker*** (1997) 80 FCR 1, 17; ***Hoverd*** (585). See also appeal ts 12, 166.
[96] ***N W Robbie & Co Ltd v Witney Warehouse Co Ltd*** (1963) 1 WLR 1324.

a right to legal set-off, equity will intervene where the exercise of the legal right would be unconscientious.[97]

Fixed and floating charges, circulating assets, and the PPSA

59 The PPSA contains provisions dealing with references to fixed and floating charges in Commonwealth laws and security agreements (such as the GSA in this case).[98] In particular, a reference in such instruments to a 'charge' over property is taken to be a reference to a security interest that has attached to a 'circulating asset' or to a security interest that has attached to personal property that is not a 'circulating asset'.[99] A reference to a 'fixed charge' in such an instrument is taken to be a reference to a security interest that has attached to personal property that is *not* a 'circulating asset'.[100] A reference to a 'floating charge' is taken to be a reference to a security interest attached to a 'circulating asset'.[101]

60 The PPSA recognises that such references in instruments are likely to have less relevance over time.[102] That is because the PPSA has its own rules for the enforcement of security agreements against grantors of security and third parties.[103] Thus, at least in general terms, there is no need to characterise the instrument as either a fixed or a floating charge for the purpose of determining priority disputes under the PPSA. The PPSA evidently seeks, amongst other things, to provide a 'rational resolution' to priority disputes whilst avoiding the entanglements of the theories under the general law as to the nature of a chargee's interest under a floating charge prior to crystallisation.[104]

61 Under the PPSA, circulating assets are defined to include specified types of current assets.[105] These include 'accounts' which, in general terms, include, relevantly, monetary obligations arising from the provision of services in the ordinary course of the business of providing services of that kind.[106] An exception to this, which in broad terms is consistent with the pre-PPSA law, is that an account is not a circulating asset if the secured party has 'control' of the account.[107] 'Control' for this

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[97] See the discussion of ***N W Robbie*** in *Meagher, Gummow & Lehane* [29-220]. See also *Derham* [17.03].
[98] PPSA Pt 9.5.
[99] PPSA s 339(3).
[100] PPSA s 339(4).
[101] PPSA s 339(5).
[102] PPSA s 338.
[103] PPSA s 19 and s 20.
[104] Compare Professor Worthington's comments referred to in [56] above.
[105] PPSA s 340(1)(a) and s 340(5).
[106] PPSA s 340(1)(a), s 340(5)(a) and definition of 'account' in s 10.
[107] PPSA s 340(2).

purpose includes its ordinary meaning.[108] 'Control' also includes where the parties have agreed in writing that the amounts paid in discharge of the account must be deposited into a specified bank account controlled by the secured party.[109]

62 In the case of assets other than the specified current assets, a 'circulating asset' is one where the secured party has given the grantor of the charge express or implied authority for any transfer of the personal property to be made in the ordinary course of the grantor's business, free of the security interest.[110]

63 A circulating asset is an example of collateral within the exceptions to s 32(1) of the PPSA. In broad terms, the effect of s 32(1) of the PPSA is that (subject to the provisions of the PPSA) if collateral gives rise to proceeds, the security interest continues in the collateral itself in the hands of a transferee *unless* the secured party expressly or impliedly authorised the disposal of the collateral or agreed that the dealing would extinguish the security interest, and the security interest attaches to the proceeds *unless* the security agreement provides otherwise.

64 The *Corporations Act* has been amended, effectively in tandem with the PPSA, so that security interests, which have attached to 'circulating assets' under the PPSA where the grantor has title to the asset, are grouped together with floating charges, and called 'circulating security interests'. These amendments apply to various provisions in ch 5 of the *Corporations Act* (headed External Administration), including, amongst other things, the proof and ranking of claims in a winding up.[111] In other words, in ch 5 of the *Corporations Act*, a security interest that is a floating charge is treated in the same way as a security interest attached to a circulating asset under the PPSA where the grantor has title to the asset.

Set-off in insolvency

65 Provisions such as s 553C of the *Corporations Act*, which provide for a statutory set-off in circumstances of mutuality, have a long history in the law of bankruptcy and insolvency. There is a dispute as to whether its origins lay in equity, or whether the practice emerged from the

[108] PPSA s 341(1A)(a).
[109] PPSA s 341(1A)(c), s 341(2)(a) and s 341(3).
[110] PPSA s 340(1)(b).
[111] See *Corporations Act* s 51C, s 433, s 442B, s 443E, s 459C, s 561 and s 588FJ. Section 561 is in div 6 of pt 5.6 'Proof and ranking of claims'. See also the definition of 'floating charge' in s 9.

interpretation and application of bankruptcy legislation in Elizabethan times.[112] The earliest statutory insolvency set-off provision would appear to have been enacted in the United Kingdom in 1705, which applied where there appeared to be 'mutual credit given between' a person and a bankrupt.[113] Provisions enacted after 1732 referred to both mutual credit and mutual debts,[114] while provisions enacted after 1869 referred to mutual credits, mutual debts or other mutual dealings'.[115] Colonial bankruptcy legislation adopted the provision,[116] as did Commonwealth bankruptcy legislation enacted in 1924 and 1966.[117] The Commonwealth bankruptcy provisions were applied to corporate winding up by State company laws.[118] Section 553C was introduced into the *Corporations Law* with effect from 1993,[119] and was included in the *Corporations Act* as enacted in 2001.

66 Section 553C of the *Corporations Act* provides:

> **553C Insolvent companies - mutual credit and set-off**
>
> (1) **[Where mutual claims and debts admissible]** 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) **[Where set-off not available]** 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

[112] ***Gye v Davies*** (1995) 37 NSWLR 421, 425; ***Coventry v Charter Pacific Corporation Ltd*** [2005] HCA 67; (2005) 227 CLR 234 [30].
[113] 4 & 5 Anne c 17, s 11.
[114] The first reference to mutual debts was introduced in 1732 by 5 Geo II c 30, s 28.
[115] Reference to other mutual dealings was first made in s 39 of the *Bankruptcy Act 1869* (UK).
[116] See *Insolvent Ordinance 1856* (WA) s 41 and *Bankruptcy Act 1871* (WA) s 41.
[117] *Bankruptcy Act 1924* (Cth) s 82 and *Bankruptcy Act 1966* (Cth) s 86.
[118] See, eg, *Companies Act 1943* (WA) s 269(1) and *Corporations Law* s 553(2).
[119] By *Corporate Law Reform Act 1992* (Cth) s 92.

> of receiving credit from the company, the person had notice of the fact that the company was insolvent.

Mutuality

67 In ***Gye v McIntyre***,[120] the High Court said that mutuality in the *Bankruptcy Act 1966* (Cth) in this context involves three considerations. First, the credits, debts, or claims arising from the other dealings must be between the same persons. Secondly, the benefit or burden of the credits, debts, or claims arising from the other dealings, must lie in the same interests. It is the equitable and beneficial interests of the parties which must be considered. Thirdly, the requirement of mutuality is that the credits, debts, or claims arising from other dealings must be commensurable. That means they must ultimately sound in money.

68 It is established that the relevant time at which mutuality is to be assessed is the commencement of the winding up in insolvency,[121] which in this case is taken to be when administrators were appointed on 11 February 2014.[122] However, the credits, debts or claims need not be vested, liquidated, or enforceable at the relevant date. Providing they exist as contingent at that date, and are of a kind which will ultimately mature into pecuniary demands susceptible to set-off, the requirement of s 553C may be satisfied in relation to them.[123]

69 In ***Hiley***, Rich J said that the requirements of the relevant provision do:[124]

> not mean that at the time when the winding up commences there must exist claims which then and there can be made the subject of account and set-off … *Rights must be invested in the creditor and in the company which, without any new transaction, grow in the natural course of events into money claims capable of forming items in an account or capable of settlement by set off.* (emphasis added)

70 Also in ***Hiley***, Dixon J said:[125]

> It is enough that at the commencement of the winding-up mutual *dealings exist which involve rights and obligations* whether absolute or contingent

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[120] ***Gye v McIntyre*** [1991] HCA 60; (1991) 171 CLR 609.
[121] ***Hiley*** (480 - 481, 487, 490, 495 - 496).
[122] *Corporations Act* s 446A(1)(a), s 446A(2)(a), s 513B(b) and s 513C(b).
[123] ***Gye v McIntyre*** (623 - 624); ***Day & Dent Constructions Pty Ltd (in liq) v North Australian Properties Pty Ltd*** [1982] HCA 20; (1982) 150 CLR 85, 91, 99, 104.
[124] ***Hiley*** (487). See also ***Hiley*** (491 - 492) (Starke J).
[125] ***Hiley*** (497).

> *of such a nature that afterwards in the events that happen they mature or develop into pecuniary demands capable of set-off*. (emphasis added)

71 The dealings must be 'genuinely mutual as a matter of substance': ***Gye v McIntyre***.[126]

The burden or benefit must lie in the same interest

72 The contentious issue in this appeal concerns the second of the criteria of mutuality referred to by the High Court in ***Gye v McIntyre*** (see [67] above).

73 An early case which considers this aspect of mutuality is ***Forster v Wilson***,[127] decided in 1843. In that case the defendants, who carried on business as ironmongers, were indebted to a partnership trading as the Tweed Bank. The defendants received promissory notes of the Tweed Bank, which were categorised into a number of different classes. Relevantly, notes in the sixth and seventh classes were received from customers in payment of antecedent debts, on condition that the debt be reduced by only so much as the defendants received for the notes. Notes in the eighth and ninth classes were received by the defendants on the basis that the defendants would pay only so much as the defendants received for the notes from the assignees of the bank.

74 The assignees of the bankrupt partners of the Tweed Bank sought to recover the debt owed by the defendants to the bank, and the defendants sought to set-off the amounts they were owed under the promissory notes. Parke B, delivering the judgment of the court, observed that the object of the relevant provision of the 1825 Act[128] was:

> [T]o do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate; and the Court of King's Bench, in construing this clause … have held that it did not authorize a set-off, where the debt, though legally due to the debtor from the bankrupt, was really due to him as a trustee for another, and, although recoverable in a cross action, *would not have been recovered for his own benefit*. (emphasis added) (204)

75 The court held that the defendants could set-off the notes in the sixth and seventh classes, but not the eighth or ninth classes. The latter classes were excluded on the basis that the notes:

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[126] ***Gye v McIntyre*** (619).
[127] ***Forster v Wilson*** (1843) 12 M & W 191; 152 ER 1165.
[128] 6 Geo IV c16, s 50.

> [W]ere held by the defendants, not on their own account, but as trustees for those persons [who handed the defendants the notes], because the defendants could gain nothing in any event by the notes, but all the money they should receive upon them would be received to the use of the persons who transferred them. (204)

76 ***Forster v Wilson*** was applied by Lord Cairns LJ in ***Ex parte Cleland; In re Davies***.[129] In that case, Davies had been ordered to pay Cleland's costs of legal proceedings, which had been taxed. Davies entered into a deed under the *Bankruptcy Act 1861* (UK). Davies sought to set-off the taxed costs against a debt which Cleland owed to Davies. Cleland had not paid the costs to his solicitor. After quoting the passage from ***Forster v Wilson*** set out at [74] above, Lord Cairns held that a set-off was not available as:

> The costs, though recoverable in the name of Cleland, and though ordered to be paid to Cleland by name, are paid to him, *not for his own benefit, for he could not take the money and spend it*; but are to be paid to him subject to the lien of his solicitor, and are, therefore, to be held by him, either in whole or in part, as a trustee for his solicitor. (emphasis added) (813)

77 Both ***Forster v Wilson*** and ***Ex parte Cleland*** were applied by the English Court of Appeal in ***In re City Life Assurance Co Ltd***.[130] In the latter case, the holder of a life insurance policy for £1,000 had mortgaged the policy to the issuing company in order to secure a loan of the same amount. The issuing company went into compulsory liquidation. Before doing so, it had equitably assigned the mortgage to a third party, without notice to the policy holder. The question arose as to whether the policy holder could set-off the amount due to him under the policy against his mortgage debt. Pollock MR held that the bankruptcy set-off clause did not apply 'when the credits or debts or dealings are not between the same persons, or where one of the persons was acting in a different capacity from that in which the dealings with the other were incurred'. After quoting the passage set out at [74] above, Pollock MR held that the assignment of the mortgage meant that there was no mutuality which would enable the policy holder to set-off, as between him and the liquidator, the sums due under the policy.[131]

78 ***Forster v Wilson*** and ***In re City Life Assurance Co*** were both cited by the High Court in ***Gye v McIntyre***, in the course of explaining the policy and operation of s 86 of the *Bankruptcy Act*. After referring

[129] ***Ex parte Cleland; In re Davies*** (1867) LR 2 Ch 808.
[130] ***In re City Life Assurance Co Ltd*** [1926] 1 Ch 191.
[131] ***In re City Life Assurance Co*** (216 - 217).

to Parke B's identification of the object of the provision, the court observed:

> Where there are genuine mutual debts, credits or other dealings, it would be unjust if the trustee in bankruptcy could insist upon having 100 cents in the dollar upon the whole of the debt owed to the bankrupt but at the same time insist that the bankrupt's debtor must be satisfied with a dividend of some few cents in the dollar on the whole of the debt owed by the bankrupt to him. It was to prevent such injustice that the 'mutual credits' and 'mutual debts', and later 'mutual dealings', provisions were introduced into bankruptcy legislation. To the extent necessary to achieve that legislative purpose of 'substantial justice' to the parties, it is established by authority that a provision such as s. 86 of the Act should be given 'the widest possible scope'.
>
> On the other hand, 'substantial justice' requires that the operation of set-off in bankruptcy be confined within limits which protect the creditors of the bankrupt from being disadvantaged by a set-off being allowed in circumstances where debts, credits or other dealings have not been genuinely mutual as a matter of substance, *such as* where beneficial ownership is not the same. (citations omitted) (emphasis added) (618 - 619)

79 It should be noted that, in this passage, a difference in beneficial ownership is given as an example of where mutuality may be absent, rather than a criterion of operation of the provision. After referring to a presently irrelevant issue the court continued:

> Thus, it is established by the cases that set-off under a provision such as s. 86 is not available in circumstances where the beneficial entitlement and liability in respect of the countervailing credits and debits do not correspond: see, e.g., ***In re City Life Assurance Co***.; ***Hiley v. Peoples Prudential Assurance Co. Ltd***. (citations omitted) (619)

80 The cited passage of ***In re City Life Assurance Co*** is that in which the passage of Parke B's reasons in ***Forster v Wilson*** set out at [74] above is quoted. The reference to ***Hiley***[132] is to the following passage from the judgment of Dixon J:

> In the second place, the equitable or beneficial interest of the parties in the mutual debts, credits or dealings must be considered and not merely the dry legal right. A set-off will be allowed between a debt owing by C to a liquidating company and a debt owing by it to B, if B as creditor holds the chose in action as bare trustee for C. Correspondingly, a set-off will be refused between a debt owing by B to a liquidating company and

[132] ***Hiley*** (497).

> a debt owing by it to B, if B as creditor hold the chose in action as bare trustee for C. (citations omitted) (497)

81 In ***Hiley***, an insurance company issued a policy of insurance to Hiley in the amount of £1,000. Hiley subsequently borrowed £1,000 on security of a mortgage of the policy. Before going into liquidation, the company transferred its mortgage to a second company, which in turn transferred the mortgage to a bank. Although absolute in form, each of the transfers was by way of security. A compromise of a dispute as to the validity of the transfers resulted in the mortgage being returned to the insurance company which issued the policy. The majority of the court held that the requirement of mutuality was satisfied.

82 The decision of Parke B in ***Forster*** was also cited with approval by the plurality in ***Coventry v Charter Pacific Corporation Ltd***.[133]

83 In ***Mathieson's Trustee v Burrup Mathieson & Co***,[134] in the course of considering whether an equitable claim could be set-off against a legal debt, Clauson J observed:

> On principle it appears to me that the mere fact that the debt is an equitable debt, and not a legal debt, has no bearing at all on the question whether it is available for the purpose of set-off under s. 31. The Bankruptcy Act, as I understand it, is an Act regulating the proceedings of a Court which has always been a Court of equity, proceeding on equitable principles, recognizing equitable debts, subject of course to such infirmities as are sometimes present, but drawing no distinction between equitable and legal rights for purposes of administering the estate of the bankrupt. I think, at this time of day, it would be very unfortunate, if it were held that a Court of Bankruptcy is in any way fettered by any such distinctions, except so far as any Court of equity is fettered by the fact that certain infirmities may in certain circumstances attach to equitable rights as compared with corresponding legal rights. Accordingly I decide that this set-off claimed by the defendants is a good set-off and is operative to overtop the claim which has been made by the plaintiff in his action. (569)

84 The above cases demonstrate that in deciding whether mutuality exists, equitable or beneficial interests must be considered, and that a difference in beneficial ownership may lead to a conclusion that mutuality is lacking. However, in our view, that is but an example of a situation in which mutuality may be lacking. The existence of a trust or other equitable interests is not made the criterion for operation of the

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[133] ***Coventry v Charter Pacific Corporation Ltd*** [2005] HCA 67; (2005) 227 CLR 234 [31].

[134] ***Mathieson's Trustee v Burrup Mathieson & Co*** [1927] 1 Ch 562, 569. This decision is cited without demur in ***Gye v McIntyre*** (633) and ***Hiley*** (497).

provision. The critical issue in assessing mutuality is not the source of the relevant parties' rights (the common law, equity or statute) but the content of those rights. The critical question is that which was identified by Parke B in ***Forster v Wilson***, subsequently cited in the later cases. The question is whether, at the commencement of the liquidation, the debt sought to be used as a set-off by the creditor of an insolvent party would have been recovered 'for his own benefit', or vice versa.

85 In this context, it should be observed that a secured debt may be the subject of (statutory) insolvency set-off. Insolvency set-off is not necessarily confined to unsecured debts.[135]

86 Focussing on whether the payments are received for the relevant person's own benefit explains why, under the general law, fixed charges generally destroyed mutuality while floating charges did not. Where, for example, the insolvent's receivables are subject to a floating charge, mutuality for the purposes of insolvency set-off subsists prior to crystallisation.[136] That is because, as a matter of substance, the chargor may collect the receivable and use the proceeds for its own benefit. It is not required to collect the receivable and apply the proceeds for the benefit of the chargee. On the other hand, once the charge becomes fixed, there is an absence of mutuality for the purposes of insolvency set-off.[137] That is because, in substance, the receivable is being recovered for the benefit of the chargee, and not the insolvent chargor. In that way, property which is subject to a floating charge may be used by the security grantor for its own benefit while property which is the subject of a fixed charge may not.

87 Therefore, the critical question when assessing mutuality is not the classification of a charge over receivables as fixed or floating, but whether the chargor has the right to use payments received for its own benefit.

Credits, debts and mutual dealings

88 In ***Gye v McIntyre***, the High Court observed that the words 'credits' and 'debts' will ordinarily represent the *outcome* of dealings, rather than the dealings themselves. Accordingly, 'dealings' of themselves (as opposed to their outcome) do not commonly represent credits or debts capable of mutual set-off. That being so, the requirement of mutuality in respect of 'other … dealings' is directed not so much to

[135] ***Hiley*** (498).
[136] See [57] above.
[137] See [57] above.

the relationship between the dealings as such, but to the relationship between the claims which have arisen from them. The High Court said:[138]

> *There will*, for the purposes of s 86, *be mutual dealings at the date of the sequestration order if there existed at that date 'dealings'* which involve the bankrupt and the other party and *which were capable of giving rise to, and subsequently did give rise to, 'mutual' claims between them* in the sense in which the word 'mutual' used in s 86. (emphasis added)

The nature of the set-off

89 The chapeau to s 553C of the *Corporations Act* refers to 'a person who wants to have a debt or claim admitted against the company'. Hamersley, through its counsel, acknowledges that there is no pleading, evidence, submission or finding that it wishes to prove in the liquidation of Forge.[139] However, it has been held that reference to such a person includes a person who, but for any statutory set-off, would be entitled to prove in the winding up.[140] That reflects the approach which has been taken in relation to similar language in bankruptcy legislation.[141] Therefore, the fact that Hamersley has not sought to prove in the liquidation is not itself an impediment to the application of s 553C.

90 As to the nature of the set-off, in the Federal Court in ***McIntyre v Perkes***; ***McIntyre v Gye***,[142] Gummow and von Doussa JJ observed, with reference to the terms 'an account shall be taken' and 'only the balance of the account may be claimed in the bankruptcy, or is payable to the trustee in the bankruptcy, as the case may be' in s 86(1) of the *Bankruptcy Act*:

> [T]he form in which s 86(1) is expressed may suggest that the right of set-off it confers (like that provided for in the Statutes of Set-off) is procedural rather than substantive in character. It is true that s 86 of the *Bankruptcy Act*, like its predecessors, is directed to a particular procedure, the taking of an account. …
>
> However, the *closing words of s 86(1)(c) indicate that where there is a balance payable to the trustee, only that part of the sum due from the creditor of the bankrupt 'is payable' to the trustee. This gives the result of the account substantive effect*. Thus, under the antecedent law in the United Kingdom, it was long ago held that the set-off provided for in the bankruptcy statutes might be pleaded by the creditor, as defendant by

[138] ***Gye v McIntyre*** (623).
[139] Appeal ts 110 - 111.
[140] See ***G M & A M Pearce and Co Pty Ltd v RGM Australia Pty Ltd*** [1998] 4 VR 888, 890; ***Mine & Quarry Equipment International Ltd v McIntosh*** [2005] QCA 186; (2005) 54 ACSR 1 [6].
[141] ***Gye v McIntyre*** (621).
[142] ***McIntyre v Perkes; McIntyre v Gye*** (1990) 22 FCR 260, 270.

> way of confession and avoidance of an action at law which was brought by the assignee in bankruptcy to satisfy the bankrupt's claim and for the benefit of the bankruptcy administration. (emphasis added)

91 It is not necessary, however, for the parties to take any steps towards the taking of an account, as the statutory set-off in insolvency is treated as self-executing. In ***Gye v McIntyre***, the High Court said:[143]

> Section 86 is a statutory directive ('shall be set off') which operates as at the time the bankruptcy takes effect. It produces a balance upon the basis of which the bankruptcy administration can proceed. Only that balance can be claimed in the bankruptcy or recovered by the trustee. If its operation is to produce a nil balance, its effect will be that there is nothing at all which can be claimed in the bankruptcy or recovered in proceedings by the trustee. The section is self-executing in the sense that its operation is automatic and not dependent upon 'the option of either party'. … [I]it would be wrong to attribute to the legislature the illogical intent that a directive which was intended to be otherwise automatic in its operation and to apply in circumstances where set-off produced a nil balance should not operate at all unless and until either the bankrupt's creditor saw fit to exercise the option of lodging a formal proof of debt or the trustee in bankruptcy instituted proceedings for recovery of a debt due to the bankrupt.

92 The self-executing nature of the set-off was considered by Hoffmann LJ in ***MS Fashions Ltd v Bank of Credit and Commerce International SA (in liq)***:[144]

> Certain principles as to the application of these provisions have been established by the cases. First, *the rule is mandatory* ('the mandatory principle'). *If there have been mutual dealings before the winding up order which have given rise to cross-claims, neither party can prove or sue for his full claim. An account must be taken and he must prove or sue (as the case may be) for the balance. Secondly, the account is taken as at the date of the winding up order ('the retroactivity principle'). This is only one manifestation of a wider principle of insolvency law, namely, that the liquidation and distribution of the assets of the insolvent company are treated as notionally taking place simultaneously on the date of the winding up order*: see ***In re Dynamics Corporation of America*** [1976] 1 WLR 757, 762, per Oliver J. *Thirdly, in taking the account the court has regard to events which have occurred since the date of the winding up ('the hindsight principle'). The hindsight principle is pervasive in the valuation of claims and the taking of accounts in bankruptcy and in winding up*. A good example of the principle being applied outside the context of set-off is ***In re Northern Counties of***

[143] ***Gye v McIntyre*** (622). See also ***Handberg v Smarter Way (Aust) Pty Ltd*** [2002] FCA 469; (2002) 20 ACLC 856 [30], [46], [55].
[144] ***MS Fashions Ltd v Bank of Credit and Commerce International SA (in liq)*** [1993] Ch 425, 432 - 433.

> ***England Fire Insurance Co; Macfarlane's Claim*** (1880) 17 Ch D 337, in which the value of a claim under a fire insurance policy was determined by reference to the loss suffered in a fire which occurred a month after the insurance company had been wound up.
>
> In reading the cases, the interaction of these principles has to be borne in mind. [Counsel] said *that the right of set-off under [the relevant statutory mutual dealings provision] was procedural and that the mutual credits and debits … retain their separate existences until such time as the account* is taken in the context of the director filing either a proof or a defence to a claim by the liquidator. *This is of course true in the ... sense that no account will be taken until something happens which makes it necessary to apply [the relevant statutory mutual dealings provision] and to take one*. *But that cannot* in my judgment *affect the substantive rights of the parties which*, whatever the context in which the question may subsequently arise, *are treated as having been determined by an account taken at the date of the winding up*. (emphasis added)

93 In other words, the (insolvency) statutory set-off, where it applies, is treated as having occurred as from the date of the sequestration order or other relevant date. His Lordship in ***Stein v Blake***[145] made observations to similar effect, with reference to the reasoning of the High Court in ***Gye v McIntyre***,[146] which have since been adopted in Australia.[147]

The object of insolvency statutory set-off

94 In ***Gye v McIntyre***,[148] the High Court said, with reference to the relevant statutory provisions in the *Bankruptcy Act*:

> Putting s 86 to one side, the other sections in the Division deal with the quantification of provable debts, the procedure for their admission to proof and the special situation which arises when a provable debt is secured.
>
> …
>
> It has often been pointed out that *the object of set-off in bankruptcy is*, in the words of Parke B in ***Forster v Wilson***, *'to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate'. Where there are genuine mutual debts, credits or other dealings, it would be unjust if the trustee in bankruptcy could insist*

[145] ***Stein v Blake*** [1995] 2 WLR 710.
[146] ***Stein*** (715 - 718).
[147] ***Citicorp Australia Ltd v Official Trustee in Bankruptcy*** (1996) 71 FCR 550, 567 - 568; ***G M & A M Pearce*** (890, 896 - 899); ***Handberg*** [55] - [56]; ***Krishell Pty Ltd v Nilant*** [2006] WASCA 223; (2006) 32 WAR 540 [111] - [212]. See also Keay AR, *McPherson's Law of Company Liquidation* (2nd ed, 2009) [12.025] 808.
[148] ***Gye v McIntyre*** (618 - 619).

> *upon having 100 cents in the dollar upon the whole of the debt owed to the bankrupt but at the same time insist that the bankrupt's debtor must be satisfied with a dividend of some few cents in the dollar* on the whole of the debt owed by the bankrupt to him. It was to prevent such injustice that the 'mutual credits' and 'mutual debts', and later 'mutual dealings', provisions were introduced into bankruptcy legislation … To the extent necessary to achieve that legislative purpose of 'substantial justice' to the parties, it is established by authority that a provision such as s 86 of the Act should be given 'the widest possible scope' …
>
> *On the other hand, 'substantial justice' requires that the operation of set-off in bankruptcy be confined within limits which protect the creditors of the bankrupt from being disadvantaged by a set-off being allowed in circumstances where debts, credits or other dealings have not been genuinely mutual as a matter of substance, such as where beneficial ownership is not the same* or where, after bankruptcy or notice of an act of bankruptcy, a debtor of the bankrupt has bought up liabilities of the bankrupt at a discount for the purpose of setting them off against his own indebtedness … Thus, it is established by the cases that set-off under a provision such as s 86 is not available in circumstances where the beneficial entitlement and liability in respect of the countervailing credits and debits do not correspond: see, eg, ***In re City Life Assurance Co***; ***Hiley v Peoples Prudential Assurance Co Ltd***. (footnotes omitted) (emphasis added)

95 Also in ***Coventry***, Gleeson CJ, Gummow, Hayne and Callinan JJ made observations to similar effect,[149] and added:[150]

> The reasons of the Court in ***Gye v McIntyre*** pointed out that s 86, in its terms, makes plain that the section operates regardless of whether the result of a set-off would give a balance in favour of or against the bankrupt … [T]he section extends to a person who seeks to answer a claim brought by the trustee in bankruptcy by asserting a set-off of a claim otherwise provable in the bankruptcy but who has not lodged a proof of debt. (footnotes omitted)

The application of s 553C of the *Corporations Act* in this case

96 In light of the previous discussion, the operation of s 553C raises the following questions:

1. Were there 'dealings' between Forge and Hamersley?

2. Were those dealings capable of giving rise to, and subsequently did give rise to, claims one against the other?

[149] ***Coventry*** [56].
[150] ***Coventry*** [57].

3. Were those claims 'mutual', ie, 'genuinely mutual as a matter of substance'?

97 On the agreed approach to the preliminary questions in this case, there is no dispute that questions 1 and 2 above should be answered in the affirmative in relation to all of Forge's and Hamersley's claims. The only question for present purposes is question 3.

98 As to question 3, of the three criteria referred to by the High Court in ***Gye v McIntyre*** (see [67] above), the only issue in the proceedings concerns the second of those criteria: whether the benefit or burden of the claims arising from the dealings lay 'in the same interest'. Forge contends, and the primary judge found, that the bank's security interest pursuant to the PPSA operates to destroy any mutuality.

99 In the present case, there is no suggestion that, as at the time of the appointment of the administrators, Hamersley was not entitled to receive payments of money under the Contracts for its own benefit. The critical question in assessing mutuality becomes whether, as at that date, Forge was entitled to receive the payments due from Hamersley under the Contracts for its own benefit, rather than only for the benefit of the bank.

100 As noted earlier (see [85] above), insolvency set-off is not necessarily confined to unsecured debts. It is necessary to consider the bank's position under the relevant financing documents and the operation of those instruments in the context of the operation of the PPSA.

The financing documents

101 The relevant financing documents for present purposes are the GSA and a document described as the 'Common Terms Deed' (Terms Deed).[151]

102 By cl 1.3 of the GSA, words or phrases defined, relevantly, in the Terms Deed have the same meaning as those words and phrases in the GSA.

103 By the Terms Deed,[152] the word 'Account' is defined, relevantly, to have the meaning it has in the PPSA. The definition of 'Account' in the PPSA is set out in [182] below. The primary judge found, and it is not in dispute, that Forge's Payment Certificate Claims and Progress

[151] In these reasons, the GSA is the document referred to at GB 720 - 768 and the Common Terms Deed is at GB 883 - 1027.
[152] Terms deed, cl 1.1(3).

Claims are 'accounts' within the meaning of the PPSA.[153] For the reasons given later, so are Forge's Securities Claims. In other words, all of Forge's claims are 'accounts' within the meaning of s 10 of the PPSA.

104 A 'Revolving Asset' is defined in cl 1.1(25) of the GSA to mean, in effect (1) inventory, negotiable instruments (other than those deposited with the bank for security), and money, including money withdrawn or transferred from an account or other financial institution, (2) to which no Control Event applies, subject to cl 4.3.

Grant of security interest and its nature

105 By cl 3.1 of the GSA, Forge grants a Security Interest in the 'Collateral' to the bank. Security Interest is defined as including any 'security interest' as defined in the PPSA.[154] A 'security interest' under the PPSA is an interest in personal property provided for by a transaction, that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person with title to the property).[155] 'Collateral' is defined in cl 1.1(3) of the GSA to mean, in effect and relevantly for present purposes, all Forge's present and after-acquired property.

106 Clause 3.1(2) of the GSA describes the nature of the Security Interest as follows:

> (2) *This Security Interest is*:
>
> (a) *a transfer by way of security of Collateral consisting of accounts* and chattel paper as defined in the PPSA (*unless they are not*, or cease to be, *Revolving Assets*); and
>
> (b) *a charge over all other Collateral. If for any reason it is necessary to determine the nature of this charge, it is a floating charge over Revolving Assets* and a *fixed charge over all other Collateral*. (emphasis added)

107 In this case, cl 3.1(2)(b) applies rather than cl 3.2(a). Whilst Forge's claims are 'accounts', they are not Revolving Assets as defined.

108 The reference to 'charge' in the phrase 'a charge over all other Collateral' in the first part of cl 3.1(2)(b) is taken, by virtue of s 339(3)

[153] Primary decision [262] - [266].
[154] Terms Deed, cl 1.1 (179).
[155] PPSA s 12(1).

of the PPSA, to be a reference to a security interest that has attached to a circulating asset or to personal property that is not a circulating asset.[156]

109 The application of the second sentence in cl 3.1(2)(b) is provisional in nature - '*If* for any reason it is necessary …'. In this case, it is not 'necessary' within the meaning of cl 3.1(2)(b) to make the determination referred to therein. The reference to 'charge over all other Collateral' in the first part of cl 3.1(2)(b) operates comprehensively in accordance with s 339(3) of the PPSA. No further inquiry is necessary.

110 The only question is whether Forge's claims are a circulating asset within the meaning of s 339(3)(a) of the PPSA, or personal property that is not a circulating asset within the meaning of s 339(3)(b) of the PPSA. Forge's claims are circulating assets. They are accounts within the meaning of s 340(1)(a) and s 340(5)(a) of the PPSA to which, for reasons developed later, the exception in s 340(2) of the PPSA has no application. Accordingly, the bank's security interest in Forge's claims is taken to be a reference to a security interest that has attached to a circulating asset.

111 Alternatively, if it is 'necessary' to determine the nature of the charge under cl 3.1(2)(b), the result is materially the same for essentially two reasons. First, insofar as the words 'fixed charge' in the second sentence of cl 3.1(2)(b) must be taken to refer to a security interest attached to personal property that is not a circulating asset,[157] they cannot have any application to Forge's claims because Forge's claims are circulating assets. Secondly, even if the second sentence of cl 3.1(2)(b) could be read without reference to s 339 of the PPSA, and could be read as operating solely by reference to the position under the general law, the position is no different. Insofar as the second sentence of cl 3.1(2)(b) provides that assets other than Revolving Assets are intended to be the subject of a fixed charge under the general law, that provision must be construed in the context of the GSA as a whole.[158] If, when the GSA is read as a whole, the bank has no control of the proceeds of Forge's claims, then the GSA does not yield the intention that such assets are the subject of a fixed charge.[159] Clause 3.3 recognises this consequence and provides, in effect, that the occurrence of a Control Event renders the floating charge fixed.

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[156] PPSA s 339(3).
[157] PPSA s 339(4).
[158] Including in the context of the Terms Deed.
[159] See [54] above.

112 Clause 3.3 provides:

> *To the extent that the charge in clause 3.1(2)(b) fails to take effect as a fixed charge in relation to any asset forming part of the Collateral* or the PPSA Retention of Title Property *then it takes effect as a floating charge* in relation to the asset *which automatically and immediately crystallises and becomes fixed if a Control Event occurs* and is continuing in relation to that asset. (emphasis added)

Control Event

113 A 'Control Event' is defined in cl 1.1(8) of the GSA to include the appointment of a voluntary administrator.

Collection of proceeds by Forge

114 Clause 3.4 of the GSA, in effect, permits Forge to collect the proceeds of debts or other amounts, subject to using the proceeds as permitted under the Finance Documents.

Controlled Account

115 Clause 3.5(1) of the GSA allows the bank to require Forge to open and maintain a bank account, described as a Controlled Account, effectively conferring upon the bank control over funds in that account by controlling withdrawal of money from the account, and controlling the disposal of funds from the account.

116 Clause 3.6 of the GSA provides that if a Control Event occurs and is continuing, Forge must immediately, and until notified otherwise by the bank, deposit in the Controlled Account any proceeds Forge receives in respect of, amongst other things, debts payable to Forge. A 'Control Event' is defined to include the appointment of a Receiver.

117 It is common ground that the bank did not use its power under cl 3.5(1) of the GSA to require Forge to open or operate a Controlled Account at any material time.

Dealings with Collateral

118 Clauses 4.1 and 4.2 of the GSA provide:[160]

[160] GB 734.

> **4.1 Restricted dealings**
>
> *[Forge] must not do*, or agree to do, *any of the following unless it is permitted to do so by clause 4.2* or another provision in a Finance Document:
>
> (1) *create or allow another interest in the Collateral* including any Security Interest; or
>
> (2) *dispose, or part with possession, of any Collateral*.
>
> **4.2 Permitted dealings**
>
> *[Forge] may do any of the following in the ordinary course of [Forge's] ordinary business unless it is prohibited from doing so by another provision in a Finance Document*:
>
> (1) *create or allow any interest in, or dispose or part with possession of, any Collateral which is a Revolving Asset*; or
>
> (2) *withdraw or transfer money from an account with a bank* or other financial institution.

119 As noted earlier at [104], a 'Revolving Asset' means, relevantly, assets to which no Control Event applies, subject to cl 4.3 of the GSA. Clauses 4.3 to 4.5 of the GSA provide:

> **4.3 Revolving Assets**
>
> *If a Control Event occurs* and is continuing in respect of any Collateral *then automatically*:
>
> (1) *that Collateral is not* (and immediately ceases to be) *a Revolving Asset*;
>
> (2) *any floating charge over that Collateral immediately operates as a fixed charge*; and
>
> (3) *any Collateral consisting of accounts* and chattel paper as defined in the PPSA *is transferred* to the Security Trustee *by way of security*.
>
> *If any Collateral is not*, or ceases to be, *a Revolving Asset, and becomes subject to a fixed charge or transfer*, under this clause, *the Security Trustee may give [Forge] a notice stating that*, from a date specified in the notice, *the Collateral specified in the notice is a Revolving Asset, or becomes subject to a floating charge or is transferred back to [Forge]*. This may occur any number of times.

> **4.4 Inventory**
>
> Any inventory which is not a Revolving Asset is specifically appropriated to a security interest under this document. [Forge] may not remove it without the specific and express authority of the Security Trustee to do so.
>
> **4.5 Notice may be given not to deal**
>
> *Without limiting any other provision* of this clause 4, *the Security Trustee may at any time give a notice to [Forge] to the effect that [Forge] may not deal in the Collateral described in the notice*. (emphasis added)

120 On the agreed facts, there was no relevant Control Event, and no relevant notice to Forge under cl 4.5.

Event of default

121 An 'Event of Default' is defined by cl 1.1(11) of the GSA as being in the same terms as, in effect, an Event of Default in the Terms Deed.[161] By cl 1.1(71) of the Terms Deed, an 'Event of Default' means any event defined in cl 6.1. Clause 6.1 includes an 'Insolvency Event',[162] and the term 'Insolvency Event' includes the appointing of voluntary administrators.[163]

122 On the agreed facts, there was no Event of Default at least prior to the appointment of the voluntary administrators to Forge.

Bank's rights upon Event of Default

123 By cl 7.1(1) of the GSA, if an Event of Default occurs which is continuing, then the Security is immediately enforceable and the Secured Moneys are immediately due and payable. By cl 7.1(2), the Security Trustee agrees that it will not exercise any Power to enforce the Security under ch 4 of the PPSA until an Event of Default occurs and while it is continuing.

124 Clause 7.2 of the GSA provides that any right of Forge to deal with an asset forming part of the Collateral ceases if, while an Event of Default is continuing, the Secured Moneys are declared due and payable or if the Security Trustee takes any step to enforce the Security, or a Control Event occurs in relation to the asset.

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[161] GB 725.
[162] GB 970 - 971.
[163] Terms Deed, cl 1.1(103).

125 By cl 8.1 of the GSA, if an Event of Default occurs and while it is continuing, the Security Trustee may, in effect, appoint a Receiver. By cl 9.1 of the GSA, in general terms, any money received by the Security Trustee or Receiver may be appropriated and applied towards any amount and in any order as they may determine in their absolute discretion, to the extent not prohibited by law.

Restrictions in Terms Deed

126 Clause 5.14(1) of the Terms Deed contains, in effect, a negative pledge precluding the creation by Forge of Security Interests over its assets. Clause 5.14(6) also contains specified restrictions on Forge in dealing with its assets. Clause 5.14(2) also provides, in effect, that Forge must not dispose of or part with possession of any of its assets other than a Permitted Disposal.[164]

Permitted repayment of Financial Indebtedness

127 Clause 1.1(82) of the Terms Deed defines 'Financial Indebtedness' to mean, in effect, any debt or other monetary liability in respect of moneys borrowed or raised or *any financial accommodation*.

128 Clause 5.14(3) of the Terms Deed provides:

> (3) **Financial Indebtedness**: [Forge] *must not incur*, allow to exist *or repay any Financial Indebtedness other than Permitted Financial Indebtedness*. …

129 Clause 1.1(144) of the Terms Deed provides:

> (144) **Permitted Financial Indebtedness** means, without double counting:
>
> …
>
> (f) Financial Indebtedness which is unsecured and incurred by a Borrower solely for working capital, trade finance or general corporate purposes, not exceeding A$20,000,000 …
>
> (g) Financial Indebtedness incurred under any equipment or asset finance arrangement, the amount of which does not exceed A$50,000,000 … in aggregate for the Obligors as a whole at any time.

[164] 'Permitted Disposal' includes, in general terms a disposal of an asset in the ordinary course of business and on arm's-length terms where the greater of the book value and sale value of the asset is less than A$2,000,000 and the aggregate value of all asset disposals is less than A$10,000,000 in the preceding 12 months.

…

(j) *Financial Indebtedness owing to trade creditors on account of services provided to [Forge] in the ordinary course of [Forge's] ordinary business;*

(k) Financial Indebtedness in connection with any surety or insurance bonds … issued on behalf of an Obligor in the ordinary course of its ordinary business not exceeding A$200,000,000 in aggregate of the Obligors as a whole at any time. (emphasis added)

The effect of the bank's financing documents and the application of s 553C

130 Under s 18(1) of the PPSA, the GSA and the Terms Deed are effective according to their terms.

131 The following conclusions may be drawn from the operation of the financing documents in relation to Forge's claims against Hamersley:

1. Forge's claims are accounts.

2. There was no Control Event or Event of Default prior to the appointment of voluntary administrators to Forge.

3. At no material time had the bank required Forge to open and maintain a Controlled Account, or issued a notice under cl 4.5 of the GSA.

4. By cl 3.4 of the GSA, Forge is permitted by the bank to collect the proceeds of Forge's claims, subject to using the proceeds as permitted under, relevantly, the Terms Deed.

5. Also, the money representing the proceeds of Forge's claims which are paid into Forge's bank account, are a Revolving Asset with which Forge is permitted to deal under cl 4.2 of the GSA unless prohibited from doing so under, relevantly, the Terms Deed.

6. By cl 5.14(3) of the Terms Deed, Forge may use moneys received from Forge's claims to repay its Permitted Financial Indebtedness without prior reference to, or consent from, the bank. Forge's Permitted Financial Indebtedness includes debts owed to trade creditors on account of services provided to Forge in the ordinary course of Forge's ordinary business.

7. Accordingly, Forge's claims are accounts over which the bank has no control within the meaning of s 340(2) of the PPSA. With respect to Forge's claims, the bank 'has a security interest that has attached to … a circulating asset'.[165] The fact of attachment does not affect the nature of the asset as a circulating asset, over which the bank has no control.

8. Alternatively, insofar as cl 3.1(2)(b) of the GSA invokes the operation of the general law, the absence of control means that the charge operates as a floating charge over Forge's claims.

132 It follows that, as at the commencement of the winding up, Forge's claims were, as a matter of substance, recoverable for the benefit of Forge rather than for the benefit of the bank. Any amounts paid by Hamersley to Forge under the Contracts could be used by Forge for its own benefit (by discharging its Permitted Financial Indebtedness) and was not available to the bank. Amounts payable by Forge to Hamersley under the Contracts could be used by Hamersley for its own benefit. Therefore, at that time, the dealings between Hamersley and Forge under the Contracts were mutual dealings within the meaning of s 553C of the *Corporations Act*, notwithstanding the bank's security interest.

Conclusion as to the application of s 553C in this case

133 There is, accordingly, mutuality for the purposes of s 553C of the *Corporations Act*.

134 The result is that s 553C of the *Corporations Act* is capable of operating concurrently with the PPSA. That conclusion is confirmed by the observation that in ch 5 of the *Corporations Act*, a security interest that is a floating charge is treated in the same way as a security interest attached to a circulating asset where the grantor has title to the asset.[166] The PPSA does not exclude or limit the operation of the general law or State or Commonwealth laws that are capable of operating concurrently with the PPSA.[167]

135 Nothing in the PPSA denies the operation of the provisions of the GSA which entitle Forge to use payments received from Hamersley under the Contracts for its own benefit. To the contrary, as noted at [130] above, s 18(1) of the PPSA provides that a security agreement such as the GSA is effective according to its terms. The provisions of the PPSA

[165] PPSA s 339(3)(a).
[166] See [64] above.
[167] PPSA s 254.

and the *Corporations Act* relating to security interests in circulating assets are noted above at [59] - [64]. In addition, s 32(1)(a)(i) of the PPSA (which itself operates subject to s 18) provides for Forge to have given good title to the funds disposed of with the bank's express or implied authority. Section 69 of the PPSA gives priority to persons receiving payment discharging Forge's Permitted Financial Indebtedness.

136 An important aspect of the primary judge's reasoning was his Honour's conclusion that the attachment of a security interest in collateral, as provided for by s 19 of the PPSA, confers on the secured party a proprietary interest in the collateral at the time of attachment. The primary judge also reached the related conclusion that the concept of crystallisation of a floating charge is rendered redundant by the PPSA.[168] For the purpose of disposing of this appeal it may be assumed, without deciding, that these conclusions were correct. The important point is that those conclusions do not answer the question of whether attachment of a security interest destroys mutuality. That is because the provisions of the PPSA to which we have referred accommodate a security agreement providing for a grantor to retain the right to use a circulating asset to which a security interest has attached for its own benefit. Any proprietary right in the circulating asset which a security holder gains once its security interest attaches to that collateral allows for that use. Therefore the rights which accrue to a secured party on attachment of its security interest to collateral are not necessarily inconsistent with the maintenance of mutuality between the grantor and its debtors.

137 Forge submits that the security interest created by the PPSA is akin to a fixed charge. Forge refers to a line of Canadian and New Zealand authority, in relation to similarly expressed legislation in those jurisdictions, in support of that proposition.[169] It is unnecessary to resolve this issue. Even if the PPSA creates a statutory propriety interest in collateral which is, as Forge submits, akin to a fixed charge, there is at least one significant difference between a security interest and a fixed charge. The PPSA accommodates payments received in discharge of a debt owed to the security grantor, which is collateral, being used for the benefit of the security grantor. A fixed charge under the general law does not. That difference means that, whatever the nature of a security interest under the PPSA, the attachment of the security interest to the debt owed to the security grantor does not necessarily destroy mutuality of the

[168] Primary decision [313] - [393].
[169] Referred to in the primary decision at [347] - [368].

dealings between the security grantor and its debtors. The critical question in this case remains whether payments received can be used for the benefit of the security grantor.

138 For the reasons explained above, under the GSA read with the PPSA, at the relevant date Forge retained the right to use amounts paid by Hamersley to Forge under the Contracts for its own benefit (by discharging its Permitted Financial Indebtedness). Therefore, the primary judge erred in concluding that, for the purposes of s 553C, the dealings between Forge and Hamersley under the Contracts were not mutual.

Whether and to what extent s 553C operates as a 'code'

139 The next part of these reasons examines the position on the assumption that the conclusion in [132] and [138] is wrong. In other words, it will be assumed (contrary to that conclusion) that Forge is correct in contending, and the primary judge was correct in concluding, that there is no mutuality for the purposes of s 553C of the *Corporations Act* because the amounts payable by Hamersley to Forge under the Contracts were for the benefit of the bank rather than Forge. This analysis can be undertaken assuming (without deciding) that the PPSA provides for the security interest in this case to operate as a fixed charge, or creates a sui generis security interest with features relevantly equivalent to a fixed charge.

140 If s 553C has no application because, in effect, Forge's claims are recoverable for the benefit of the bank and not for the benefit of Forge, does the bank take Forge's claims subject to any equities, including equitable set-off, or does the bank take them free of any equities? Forge contends, and the primary judge found, that s 553C operates as a code so that even where s 553C set-off does *not* apply (as is now assumed), then the equities to which the claims would otherwise be subject must also have no application.

141 In this case, the Receivers relied on a number of authorities in support of their contention, including ***Day & Dent Constructions Pty Ltd (in liq) v North Australian Properties Pty Ltd***;[170] ***Re Bank of Credit and Commerce International SA (No 8)***;[171] ***Paganini v The Official***

[170] ***Day & Dent Constructions Pty Ltd (in liq) v North Australian Properties Pty Ltd*** (1981) 54 FLR 277, 281 (Forster J), 292 (McGregor J), 324 - 325 (Sheppard J).
[171] ***Re Bank of Credit and Commerce International SA (No 8)*** [1996] Ch 245, 269 - 270.

Assignee[172] and ***Ansett Australia Ltd v Travel Software Solutions Pty Ltd***.[173]

Contracting out - principles

142 If a statute does not expressly prohibit contracting out, its provisions must be construed to determine whether contracting out is prohibited and, if allowed, to what extent: ***Qantas Airways Ltd v Gubbins***.[174]

143 In ***Caltex Oil (Australia) Pty Ltd v Best***,[175] Mason CJ, Gaudron and McHugh JJ said:

> An express statutory prohibition against contracting out renders void or inoperative contractual provisions which are inconsistent with the statute. Inconsistency between contract and statute is not confined to literal conflicts or collisions between the contractual provisions and the statutory provisions. *Inconsistency in this context arises whenever there is a conflict between a contractual provision or the operation of such a provision and the purpose or policy of the statute. So, if the operation of a contractual provision defeats or circumvents the statutory purpose or policy, then the provision is inconsistent in the relevant sense and falls within the injunction against contracting out.*
>
> *The principle that it is not permissible to do indirectly what is prohibited directly … is a more traditional general statement of the same proposition.*
>
> The critical question then is whether the Act, on its true construction, manifests a purpose or policy which is at odds with the [relevant contractual] right [asserted]. (emphasis added)

144 Regard is to be had primarily to the scope and purpose of the statute to consider whether the legislative purpose will be fulfilled without regarding the contract as void and unenforceable: ***International Air Transport Association v Ansett Australia Holdings Ltd***.[176] It is essential to begin with the elementary proposition that insolvency law is statutory and primacy must be given to the relevant statutory text. It is

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[172] ***Paganini v The Official Assignee*** (Unreported, NZCA, 12 March 1999) [10].
[173] ***Ansett Australia Ltd v Travel Software Solutions Pty Ltd*** [2007] VSC 326; (2007) 214 FLR 203, 94.
[174] ***Qantas Airways Ltd v Gubbins*** (1992) 28 NSWLR 26, 31 citing ***Felton v Mulligan*** (1971) 124 CLR 367, 376, 386.
[175] ***Caltex Oil (Australia) Pty Ltd v Best*** [1990] HCA 53; (1990) 170 CLR 516, 522 - 523. See also ***Westfield Management Ltd v AMP Capital Property Nominees Ltd*** [2012] HCA 54; (2012) 247 CLR 129 [46].
[176] ***International Air Transport Association v Ansett Australia Holdings Ltd*** [2008] HCA 3; (2008) 234 CLR 151 [72] (***IATA v Ansett***).

impermissible to assert that the public policy achieves what the statute otherwise itself does not achieve.[177]

145 As Kearney J in effect observed in ***Northern Territory of Australia v Northern Land Council***,[178] a statement that a statutory scheme is a 'code' is of doubtful utility as an analytical tool because it is in the nature of a conclusory statement. Rather, his Honour said, it is 'essential … to ascertain the real intention of parliament by carefully attending to the whole scope of the [Act] … it is necessary to examine the subject matter and ascertain the general object sought to be attained'.

Whether the parties can agree that s 553C has no application

146 The Full Federal Court in ***Gye v McIntyre***[179] said that the statutory right of insolvency set-off may not be excluded by agreement.[180] In other words, the parties cannot agree that, where the circumstances attract the application of statutory set-off, no such set-off shall apply.

147 In ***Gye v McIntyre***,[181] the High Court said that the better view is that the statutory rule of set-off will, '*where the requirements of the section are satisfied*', prevail over a contrary agreement of the parties. Observations in ***G M & A M Pearce***[182] are to similar effect.

148 In a similar vein, in ***IATA v Ansett***, Gummow, Hayne, Heydon, Crennan and Kiefel JJ said that the critical point in ***British Eagle International Airlines Ltd v Compagnie Nationale Air France***[183] was that there was 'property' of the company to which the relevant English pari passu provision applied, and 'a contractual provision negating that outcome could not prevail against the terms of the statute'.[184]

149 Professor Keay has also observed:[185]

> *[T]he traditional view that the statutory rule of set-off* in r 4.90 *will, where the conditions contained in it are met, takes [sic] precedence over a contrary agreement of the parties, is plainly the prevailing view*. This means that the rule cannot be contracted out of by the parties involved, and one should not be able to waive the operation of the set-off provision. *The rationale for this is that set-off is an aid to orderly winding up of the*

[177] ***IATA v Ansett*** [78] - [79].
[178] ***Northern Territory of Australia v Northern Land Council*** (1992) 81 NTR 1, 9.
[179] ***Gye v McIntyre*** (627).
[180] ***McIntyre v Perkes*** (273).
[181] ***Gye v McIntyre*** (622).
[182] ***G M & A M Pearce*** (901).
[183] ***British Eagle International Airlines Ltd v Compagnie Nationale Air France*** [1975] 1 WLR 748.
[184] ***IATA v Ansett*** [76].
[185] *McPherson's Law of Company Liquidation* [12.025] 808.

> *estate and this benefits the public interest. This follows from the fact that winding up is a collective procedure whereby creditors are not able to enforce their private individual rights against the company, but get the right to a share of the company's assets on distribution by the liquidator*. (footnotes omitted) (emphasis added)

150 In our view, both principle and authority indicate that where the (insolvency) statutory set-off applies to the circumstances, any contractual or other general law rights which purport, directly or indirectly, to preclude the mandated set-off, or give it a more extensive or less extensive operation than that required by the statute, would be contrary to the intended operation of the provision. The cases relied on by the Receivers referred to earlier (at [141]) are consistent with that conclusion.

Whether s 553C operates as a 'code' when s 553C does not apply

151 The next question is whether, as the primary judge found and the Receivers contend, s 553C operates so that even if it does not apply to the dealings in question because amounts payable by Hamersley under the Contracts were for the benefit of the bank rather than Forge, it nevertheless necessarily precludes the application of set-offs which would otherwise apply. The following observations may be made.

152 First, in ***Gye v McIntyre***, the High Court observed, without deciding the question, that s 86 of the *Bankruptcy Act* should be construed as allowing a set-off, in favour of the trustee in bankruptcy against a creditor of the bankrupt, only where the claim against the creditor is one which vests in the trustee in bankruptcy.[186]

153 That observation appears to reflect the underlying position that a claim not available to the trustee in bankruptcy, or to a liquidator of an insolvent company, is not available for the benefit of the insolvent's unsecured creditors and, in substance, stands outside of the insolvency scheme for the administration of the 'fund'. In ***Piccone v Suncorp Metway Insurance Ltd***,[187] the Full Court of the Federal Court of Australia observed:[188]

> *It was* at least tentatively *submitted* on behalf of the applicant *that s 86 exhaustively defines the right of a creditor to set off a debt owed by a bankrupt* against any claim by the bankrupt against the creditor, and that the respondent is therefore barred from pursuing its set-off and

[186] ***Gye v McIntyre*** (627).
[187] ***Piccone v Suncorp Metway Insurance Ltd*** [2005] FCAFC 260; (2005) 148 FCR 437.
[188] ***Piccone*** [12].

> counter-claim in the Supreme Court. *However the section only regulates the way in which mutual debits and credits are to be taken into account in the administration of the bankrupt estate. It says nothing concerning the respective rights and obligations of creditors and bankrupts outside of such an administration*. (emphasis added)

154 Secondly, in the case of a bankrupt estate, legal set-off[189] outside bankruptcy set-off may be available for the benefit of a creditor against the bankrupt, even where bankruptcy set-off is itself not available: ***Davies v Gertig***.[190] In ***Gertig***, Doyle CJ (Mullighan & Besanko JJ relevantly agreeing) emphasised that in circumstances where a creditor has a provable claim against the bankrupt estate, and the bankrupt has a claim against the creditor which does not form part of the assets of the bankrupt's estate, to allow a set-off by the creditor against the bankrupt's claim will be for the *benefit* of the general body of unsecured creditors. The set-off in such circumstances does not diminish the fund available for distribution to unsecured creditors.[191]

155 In that case, Mr Gertig had a claim provable in the bankruptcy of Mr Davies for the costs of an action brought by Mr Davies against him, but Mr Davies' claim, being a damages award for personal injuries in the same action, was not an asset vested in the trustee. Mr Gertig's claim for costs exceeded Mr Davies' damages claim. It was held, at first instance, by the primary judge, after reference to ***Gye v McIntyre***, that Mr Gertig's claim for costs could not be set-off under the *Bankruptcy Act* against Mr Davies' award for damages because Mr Davies' damages award did not vest in the trustee.[192] Mr Gertig nevertheless sought an order under the relevant procedural Rules of Court that his costs be set off against (and effectively extinguish) Mr Davies' judgment for damages. The primary judge refused the order to set off under the Rules on the basis that such an order would be contrary to s 58(3)(a) of the *Bankruptcy Act*, which prohibits the enforcement of any remedy against the bankrupt or his property.[193] Mr Gertig appealed to the Full Court, and the Full Court allowed the appeal. Doyle CJ said:[194]

> If Mr Gertig's claim succeeds the creditors [of Mr Davies' bankrupt estate] generally will benefit, to the extent that his claim is no longer a claim against property of Mr Davies that vests in the trustee. *While Mr Gertig will secure a better outcome than other creditors* [by the

[189] In the form of a set-off under the procedural Rules of Court.
[190] ***Davies v Gertig*** (2003) 85 SASR 226 (***Gertig***).
[191] ***Gertig*** [51].
[192] ***Davies v Gertig (No 2)*** [2002] SASC 257; (2002) 83 SASR 521, 529 - 530.
[193] ***Davies v Gertig (No 2)*** (538 - 539).
[194] ***Gertig*** [20], [51] - [52].

> proposed procedural set off], *that will not be at the expense of other creditors because they have no right of access to the asset represented by the award of damages*.
>
> …
>
> … If a set-off is allowed, as I noted earlier, Mr Gertig will be in a better position than other creditors. On the other hand, that is not achieved at the expense of other creditors. Indeed, they all benefit because his claim will no longer be a claim for a share in the assets held by the trustee.
>
> For those reasons, my view is that *my interpretation of s 58(3)(a) of the [Bankruptcy] Act does not produce a result that is contrary to the statutory scheme, and to the extent that that supports the conclusion that I have reached, I rely upon it*. (emphasis added)

156 Thirdly, where a secured creditor, such as a chargee, elects to stand outside the administration of the insolvent,[195] and rely on its security for the recovery of its debt, it has been held in England that the statutory set-off does not apply to reduce the secured creditors' claim.[196]

157 In ***Re Asiatic Electric Co Pty Ltd***,[197] Street J observed:

> *The secured creditor has property rights, in the form of his security, that exist outside and above the winding-up*. The fact of his security and its property content, unless challengeable on some particular ground available in the winding-up, is unaffected by the making of a winding-up order. *The secured creditor has his property rights under his security. He is entitled to enjoy them to the total exclusion of any inroads by the liquidator or ordinary creditors except in so far as any particular inroad might be authorised by a specific provision in the Act*, such as, for example, the provisions governing certain priorities as to wages and otherwise where the secured creditor's receiver has gone into possession under a floating charge. (emphasis added)

158 Similarly, the English Court of Appeal in ***BCCI No 8***[198] observed that insolvency:

> is concerned with the *distribution of the debtor's uncharged assets among his unsecured creditors. Trust property and security stand outside the scheme of distribution and the scope of insolvency set-off. Set-off ought*

[195] ***Re Asiatic Electric Co Pty Ltd (in liq)*** [1970] 2 NSWR 612, 614.
[196] ***Re Norman Holding Co Ltd (in liq)*** [1991] 1 WLR 10, 14 - 15; See also *McPherson's Law of Company Liquidation* [12.025] 809; *Derham* [6.178] - [6.179]. Compare ***Hiley*** (498) where the *insolvent* party had security for the debt owed to it by a creditor with whom there was a mutual dealing.
[197] ***Re Asiatic Electric Co*** (614).
[198] ***Re Bank of Credit and Commerce International SA (No 8)*** [1996] Ch 245, 256 (***BCCI No 8***).

> *not to prejudice the right of a secured creditor to enforce his securities in any order he chooses and at a time of his choice*. (emphasis added)

159 Fourthly, and by analogy with respect to the statutory operation of the pari passu rule, in Australia, the weight of authority was that public policy did not necessarily prohibit effect being given to an agreement by which a creditor agreed to subordinate its debt behind the debts of other creditors: see ***United States Trust Co of New York v Australia and New Zealand Banking Group Ltd***,[199] and the cases referred to therein.[200]

160 Fifthly, whilst the need for recourse to equitable set-off is diminished in insolvency, given the scope of the statutory set-off, the proposition that equitable set-off has potential vitality in appropriate circumstances, notwithstanding that one party may be insolvent, has received support in a number of cases.[201] The conventional starting point for considering equitable set-off in this context is the case of ***Ex parte Stephens***.[202]

161 In ***Ex parte Stephens***, Ms Stephens had instructed her bankers to sell certain annuities on her behalf, and to purchase others. The bankers sold the annuities for over £3,000 but did not purchase the new annuities, and fraudulently kept the proceeds themselves without telling Ms Stephens. Subsequently, Ms Stephens' brother, James, borrowed £1,000 from the bankers on the security of a joint and several promissory note given both by James and Ms Stephens. The bankers went into bankruptcy. The trustees in bankruptcy brought an action against James (but not Ms Stephens) at law on the promissory note for £1,000, and thereby sought to recover, for the benefit of the bankrupt estate, 100 pence in the pound in respect of that debt. James was unable to rely on bankruptcy set-off because he (unlike Ms Stephens) had no claim against the bankers for the £3,000 wrongfully retained by them (or any

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[199] ***United States Trust Co of New York v Australia and New Zealand Banking Group Ltd*** (1995) 37 NSWLR 131, 141.

[200] A similar conclusion appears to have been reached relatively recently in England in ***Re SSSL Realisations (2002) Ltd (in liq)*** (2006) Ch 610 [66]. However, earlier potential discrepancies between the English and Australian approaches on the topic of subordination agreements, presumably led to the Australian legislature enacting s 563C of the *Corporations Act*: see ***Re NIAA Corporation Ltd (in liq)*** (1993) 12 ACSR 141, 152. That provision explicitly recognises that nothing in div 6 of ch 5 of the *Corporations Act* renders a debt subordination agreement unlawful or enforceable, except so far as a debt subordination would disadvantage any creditor of the company who was not a party to, or otherwise concerned in, the debt subordination.

[201] See, eg, ***Ex parte Blagden*** (1815) 19 Ves Jun 465; (1815) 34 ER 589, 589 - 590; ***Addis v Knight*** (1817) 2 Mer 117; 35 ER 885, 887; ***Baillie v Edwards*** (1848) 2 HL Cas 73; 9 ER 1020; ***Popular Homes Ltd v Circuit Developments Ltd*** [1979] 2 NZLR 642, 658 - 660; ***McIntyre v Perkes*** (271 - 272); ***Murphy v Zamonex Pty Ltd*** (464 - 468); ***Lord v Direct Acceptance Corporation Ltd*** (364), (367 - 372); ***Westmex Operations Pty Ltd (in liq) v Westmex Ltd (in liq)*** (1994) 12 ACLC 106, 110; ***Re Trivan Pty Ltd*** (1996) 134 FLR 368, 373. The cases are discussed in *Derham* [6.26] - [6.32].

[202] ***Ex parte Stephens*** (1805) 11 Ves Jun 24; (1805) 32 ER 996.

other claim). Nevertheless, James and Ms Stephens both brought proceedings in equity, seeking orders (1) that they be at liberty to set-off what was due on the promissory note, from the £3,000 debt due from the bankers to Ms Stephens, (2) that Ms Stephens may prove for the residue in the bankruptcy, (3) that the promissory note be delivered up, and (4) that the trustees in bankruptcy be restrained from suing either or both James and Ms Stephens upon the promissory note.[203] Lord Eldon LC granted orders to that effect, save that as to the first, the order was that Ms Stephens (alone) had the liberty to set-off.[204]

162 Lord Eldon said that if the trustees in bankruptcy could proceed against James, the result would be that 'they shall recover from him the sum, for which they have the joint note of him and his sister, and that she must come in as a creditor for the whole sum of her money, received by the bankers, instead of the balance, for which she would have been creditor, if the [trustees in bankruptcy] had sued her, or arranged the account upon the principle of mutual debt and credit'.[205]

163 As to that statement, it has been observed that, at that time, the concept that bankruptcy set-off operated automatically had not been fully recognised or developed.[206] If it had, one would have expected Ms Stephens to have had the benefit of bankruptcy set-off without first seeking an account or waiting to be sued by the trustees in bankruptcy.

164 In ***Ex parte Stephens*** his Lordship continued:

> As to the doctrine of set-off, it is not necessary to say much. *This Court was in possession of it, as grounded upon principles of equity, long before the law interfered* … It is true, where the Court does not find a natural equity, going beyond the statute the construction of the law is the same in equity as at law (stat. 2 Geo II. c. 22; 8 Geo II. c. 24. As to Bankrupts, stat. 6 Geo IV. c. 16 s. 50.).[207] (emphasis added)

165 His Lordship then said:[208]

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[203] ***Stephens*** (996 - 997).
[204] ***Stephens*** (996), (997).
[205] ***Stephens*** (997).
[206] *Derham* [12.35] - [12.39].
[207] The reference in this passage to 'stat. 2 Geo II. c. 22; 8 Geo II. c. 24. is a reference to legal set-off under the statutes of set-off (*Derham* [2.04] - [2.05]). The reference to stat. 6 Geo IV. c. 16 s. 50. is a reference to one of the statutes of bankruptcy set-off (see, eg, *Derham* [6.93]). Further, although a comma appears in the report after 'equity' in the fourth line in the paragraph quoted above, the ordinary reading of the sentence would indicate that a comma, additionally or alternatively, should appear after the phrase 'construction of the law'.
[208] ***Stephens*** (997).

> *But that does not affect the general doctrine upon natural equity*. So, as to mutual debt and credit, equity must make the same construction as the law: but both in law and equity that statute [the bankruptcy statute], enabling you to prove the balance of the account upon mutual credit, has gone much farther than you could have gone either in law or equity before as to set-off (stat. 5 Geo II. c. 30, s. 28: extended by statute 6 Geo. IV.[209] (emphasis added)

166 Lord Eldon continued:

> But in this case my ground is, that the contract was entered into by [Ms] Stephens in ignorance; and, if not, I should make the same construction; for, if they had her money in their hands, as she was upon the face of the instrument a surety, *it was against conscience to do any act as against her, which should prevent her having what was no more than the proper use of her own money … and it was competent to her, if she had made the discovery immediately after the transaction on account of her brother, to have desired, that so much of the debt should be cancelled, and the difference paid*; and to have said, she had a demand against her brother for the sum of £1,000, as paid to his use; *also upon the statute of mutual debts and credits; and they shall not be permitted to say, she shall not, if she chooses, pay the debt*; when the consequence is that she loses her money and they can call upon him. *If she had this equity before the bankruptcy, so she has it afterwards*; and therefore she has a clear right to say, they shall hold £1,000 of her money in discharge of the note; and shall deliver up the note. *The consequence is, they are prevented from suing upon the note by the clear demand of justice she has against them*. (emphasis added)

167 Lord Eldon's orders reflected the juristic basis of equitable set-off at the time. Prior to the *Judicature Act*, an equitable set-off was enforced by an injunction obtained in Chancery to restrain the plaintiff at law from proceeding with his action, without giving benefit to the defendant for the amount of his cross-demand.[210] Accordingly, Lord Eldon LC's judgment appears to be to the following effect:

1. Equitable set-off antedated both the statutes of set-off and the bankruptcy statutes.

2. Where there are mutual debts and credits for the purposes of the bankruptcy legislation, equity follows the law.

3. Bankruptcy set-off was not available to Ms Stephens (apparently on the basis that it was thought not to be self-executing).

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[209] The latter two statutes are bankruptcy statutes, see, eg, *Derham* [6.38].
[210] ***AWA Ltd v Exicom Australia Pty Ltd*** (1990) 19 NSWLR 705, 710.

4. Had the bankers not fraudulently concealed the fact that Ms Stephens was a creditor for £3,000 prior to the bankruptcy, she would have had an equity to restrain the bankers from suing on the promissory note at law, and would also have had the benefit of a set-off 'upon the statute of mutual debts and credits'.[211]

5. Ms Stephens had not lost her equity merely because the bankers had gone into bankruptcy.

6. Although in the suit in Chancery, James (in addition to Ms Stephens) claimed an equitable set-off, it was not a question of set-off in the 'strict and technical sense' in that the 'question upon the whole' was whether equity could be interposed in the action at law brought by the bankers against James.[212]

168 The orders in that case achieved indirectly what could not have been achieved directly under the application of the bankruptcy set-off provisions, so far as the trustee in bankruptcy was concerned. The trustee in bankruptcy, and the unsecured creditors of the bankers, were left in the position that they would have been in had James been entitled to invoke bankruptcy set-off. The decision is effectively grounded in equity's response to the unconscientious exercise of the bankers' legal rights by the bankers' trustee in bankruptcy, albeit that the fraud had been practised before the assignment of the bankers' estate to the trustee in bankruptcy.

169 Sixthly, it remains to consider the decision in ***BCCI No 8***, referred to by Forge. In that case, a bank had lent money to a company, the principal debtor. The debt owed by the principal debtor to the bank (principal debt) was secured by a charge given by shareholders of the company, over funds the shareholders had deposited into a deposit account with the bank (shareholders/depositors). On the proper construction of the agreements, the bank could, at its option, have recourse to the money in the shareholders' deposit account, but it was not bound to have recourse to that fund in satisfaction of the principal debt. On the proper construction of the charge, the shareholders/depositors had not assumed any liability to pay the principal debt. The bank went into liquidation, and the liquidators sought to recover the principal debt from the company (ie, the principal debtor). A question arose as to whether

[211] Presumably a reference to bankruptcy set-off that would have been available but for the fraudulent concealment.
[212] ***Stephens*** (997).

the liquidators of the bank could recover the principal debt in full from the company, leaving the shareholders/depositors to prove in the liquidation of the bank for their deposit, or whether by virtue of set-off under the insolvency legislation, or otherwise, the liquidators could only recover the difference between the principal debt owed by the company, and the moneys in the deposit account. There were also other issues such as marshalling. The primary court had held that the liquidators of the bank could recover the principal debt in full. The Court of Appeal dismissed the appeal, and summarised its reasoning as follows:[213]

> In our judgment the problem in the present case is susceptible of a simple solution. The [company was] indebted to the bank. Their controlling shareholders deposited moneys with the bank. If the case had stopped there, there could have been no question of set-off in the bank's insolvency. *The bank could not have set off the debts which it owed to the depositors against the debts which their companies owed to the bank. The requirement of mutuality would have been absent. Even if all parties agreed that the bank should set off the amounts in question, it could not have done so after the bankruptcy. In the absence of the necessary mutuality, the set-off would have contravened the statutory scheme of distribution in insolvency. Once insolvency supervenes, rule 4.90 of the Insolvency Rules 1986 [the Insolvency Set-off rule] requires set-off in the situations in which it is applicable and public policy forbids it where it is not*.
>
> *By the letters of lien/charge the depositors have agreed with the bank that it may apply the amounts standing to the credit of their deposit accounts* in discharge or reduction of the indebtedness of the appellants. *That is an express agreement that the bank may set off the debts due to the depositors against the debts due from the [company], and as such it is ineffective once the bank is in liquidation*. But in any case the letters of lien/charge only *authorise* the bank to set off the debts due to the depositors against the debts due from the [company], they do not *oblige* the bank to do so; and they confer no rights of set-off on the depositors or the [company]. The [company] must, therefore, succeed under [the Insolvency Set-off rule] or not at all. Despite all the sophisticated arguments of counsel for the appellants, they have been unable to persuade us that the mandatory set-off under [the Insolvency set-off rule] is triggered by an agreement for set-off where the requirement of mutuality is absent, or that the fact that the agreements for set-off were comprised in charge-backs supplied the missing element of mutuality.
>
> … We do not consider the conclusion to be unjust. It appears to be so only because the sureties are the controlling shareholders of the principal debtors and so have a common interest in dictating how the creditor should enforce its security. *As we have stated earlier, however, it is not*

[213] ***BCCI No 8*** (272 - 273).

> *the function of insolvency set-off to prefer a creditor [the shareholders/depositors] who is not indebted to the insolvent estate [the bank]*, or whose liability is secondary only and capable of being discharged by the party primarily liable. *There is no injustice in requiring a creditor [the shareholders/depositors] against whom no claim is made to prove for the debt which is due to him.* (emphasis added)

170 Earlier in its reasons for judgment in ***BCCI No 8***, the Court of Appeal had considered ***Ex parte Stephens*** on which the company and the shareholders/depositors had relied. The Court of Appeal concluded its discussion in the following way:[214]

> Whatever be the true position, however, it is clear that ***Ex parte Stephens*** … provides no assistance to the [company]. The case is no authority for the existence of any equitable right of set-off in bankruptcy wider than the statutory right. The equity which Lord Eldon LC enforced was a different equity altogether. Unlike [Ms] Stephens, the depositors are not personally indebted to the bank, and have no right of set-off and no equity to compel the bank to resort to the security which they provided in exoneration of the [company].
>
> Nor can the [company] derive any assistance from ***Jones v Mossop***, 3 Hare 568. … *The case cannot help parties who have no rights of set-off outside the bankruptcy and who cannot bring themselves within the requirements of bankruptcy set-off.* (emphasis added)

171 The following observations may be made about ***BCCI No 8***:

1. The company was indebted to the bank, but was not a creditor of the bank. The shareholders/depositors were creditors of the bank, but were not its debtors. The fact that the company and the shareholders were separate legal entities could not be ignored. As Lord Hoffman said in the decision on appeal to the House of Lords:[215]

> The sense of injustice which is undoubtedly felt by the depositors in this case arises, I think, not so much from the operation of [the Insolvency Set-off rule] but from the principle that a company is a person separate from its controlling shareholders. If the depositors had been third parties in economic reality as well as in law, I imagine that it would not have been thought particularly unfair that the liquidators had chosen to exercise their undoubted choice of remedies and to proceed against the primary borrowers rather than resort to the third party security which they held. But the separate personality of depositor and borrower was an essential element in the structure which the parties chose to adopt

[214] ***BCCI No 8*** (269 - 270).
[215] ***BCCI No 8*** **Lords** (223).

> for their borrowings and it cannot be ignored now that BCCI has become insolvent.

2. There was no legal or equitable set-off available irrespective of any potential application of the insolvency statutory provisions regarding set-off.

3. There was no mutuality for insolvency set-off.

4. To burden the bank in liquidation with a set-off in favour of the shareholders/depositors against the separate debt owed by the company to the bank, when no set-off existed on any view of it, would prejudice the bank's unsecured creditors (because it would diminish the assets of the estate to the extent of the amount set-off), and interfere with the rights of a secured creditor to obtain payment in any manner lawfully open to it.

5. The Court of Appeal's reference to ***Ex parte Stephens*** providing no assistance to the company, appears, with respect, apposite. However, it is one thing to say that an absence of insolvency set-off cannot assist in finding a general law set-off when none exists, and another to conclude that all general law set-offs which would otherwise exist are necessarily destroyed upon an insolvency where insolvency set-off has no application to the circumstances. Their Lordships were not addressing this latter point.

172 In the appeal to the House of Lords from that decision, Lord Hoffman said: [216]

> In English law, it is strictly limited to mutual claims existing at the bankruptcy date. *There can be no set-off of claims by third parties, even with their consent. To do so would be to allow parties by agreement to subvert the fundamental principle of pari passu distribution of the insolvent company's assets*: see ***British Eagle International Airlines Ltd v Compagnie Nationale Air France*** [1975] 1 LR 758. (emphasis added)

173 Where a set-off would not 'subvert the fundamental principle of pari passu distribution of the insolvent company's assets', the rationale posited by Lord Hoffman tends to lose its force. Moreover, their Lordships were not addressing the question presently under consideration.

[216] ***BCCI No 8*** **Lords** (223).

174 The foregoing considerations combine, in our view, to indicate that s 553C of the *Corporations Act* is not a code in the sense found by the primary judge. In an insolvency where the statutory set-off does not apply to the particular circumstances of the case, it will be necessary to consider whether the absence of a statutory set-off in those particular circumstances reflects an underlying Parliamentary intention to exclude any set-off otherwise applicable.

175 It seems to us that, at least in the circumstances of this case, where the chargee stands outside the administration of the insolvent company and relies on its security to collect, for its own benefit, the debt owed to the insolvent, there is nothing in s 553C or its purpose or policy which would relieve the chargee of any equities which would otherwise apply to the charged debt. The position would be different if the chargee of the debt surrendered it and proved in the insolvent administration for its own debt. In that event, the liquidator would recover the insolvent company's debt for the benefit of all the unsecured creditors including, in that circumstance, the (former) secured creditor.

176 The results produced by the alternative view, advanced by the Receivers and accepted by the primary judge, are ones which, it might be doubted, were within Parliament's contemplation objectively ascertained.[217] Those results are:

1. Unsecured creditors are prejudiced in that the whole of Hamersley's claims are thrown on the fund to be administered for the benefit of unsecured creditors, rather than (in effect) the asset over which the bank has elected to exercise its rights of security.

2. The fact of insolvency produces a windfall to the bank. That is because it is accepted that, had the winding-up not intervened, the bank, as chargee, would have taken subject to the equities, including any rights of set-off available to Hamersley against Forge.

3. An injustice of the character which insolvency set-off is itself designed to avoid (see [94] above) would be created, rather than alleviated.

177 If s 553C itself has no application to the present circumstances, it does not, in our view, operate so that the bank takes its interest in Forge's claims free of any rights of set-off which would otherwise be applicable

[217] ***Zheng v Cai*** [2009] HCA 52; (2009) 239 CLR 446 [28].

under the general law and, or alternatively, the statutory 'equities' provided for in s 80(1) of the PPSA.[218]

Account and Forge's Securities Claims

178 This part of the reasons deals with ground 3 of the appeal concerning Forge's Securities Claims. The primary judge found that Forge's 'Payment Certificate Claims' and 'Progress Claims' were 'accounts' as defined in the PPSA, but its 'Securities Claims' were not.[219] Hamersley challenges that finding by ground 3.

179 Forge's Securities Claims involved the assertion that Hamersley wrongly called on the performance guarantees provided by Forge to secure performance of the work under the Contracts. Performance guarantees were given pursuant to a provision in the GCs to the Contracts. The relevant provision in the West Angelas Contract is GC 4.2.

The Contractor's Performance Security

180 By GC 4.2 of the Contract, Forge must maintain a bank guarantee equivalent to 10% of the Contract Price associated with the relevant Separable Part of the works. The security is reduced to 5% of the Contract Price at the commencement of the Defects Notification Period. By GC 4.2(d), Forge acknowledges and agrees not to take any steps to injunct or otherwise restrain the issuer of the guarantee from paying Hamersley, or restrain Hamersley from taking any steps for the purpose of having recourse to or making a demand under the security, or Hamersley using the money received under the security. Forge also acknowledges and agrees that Hamersley will not be in breach of GC 4.2 if Hamersley claims under the security in circumstances where the parties are or may be in dispute, and that Hamersley may have recourse to the security if it 'believes' that Forge has not performed its obligations in accordance with the Contract.[220]

[218] It is unnecessary to decide for present purposes whether the statutory 'equities' in s 80(1) of the PPSA are themselves a 'code' and displace any general law equities that would otherwise apply, or whether, if and to what extent that the general law goes beyond the s 80(1) 'equities', the two operate together - as to which see also s 254(1) of the PPSA.
[219] Primary decision [263] - [266].
[220] GB 319 - 320.

The primary judge's findings in relation to 'account' and Forge's Securities Claims

181 In relation to Forge's 'Securities Claims', the primary judge found that they were not 'accounts' as defined in the PPSA because they were not 'claims for identifiable monetary sums due by ascertainable dates arising from the disposing of property or the granting of rights in the ordinary course of business'. His Honour said they were 'claims that arose after the receivers were appointed by reason of the alleged wrongful draw down by Hamersley of securities provided by Forge'.[221] The primary judge appears to have drawn support for that conclusion by reference to ***Strategic Finance Ltd (in rec and in liq) v Bridgman***[222] and ***Re Langdon; Forge Group Limited (receivers and managers appointed) (in liq))***.[223]

Account definition

182 The PPSA defines 'account' as follows:[224]

> ***account*** *means a monetary obligation* (whether or not earned by performance, and, if payable in Australia, whether or not the person who owes the money is located in Australia) *that arises from*:
>
> (a) disposing of property (whether by sale, transfer, assignment, lease, licence or in any other way); or
>
> (b) *granting a right, or providing services, in the ordinary course of a business of granting rights or providing services of that kind* (whether or not the account debtor is the person to whom the right is granted or the services are provided);
>
> but does not include any of the following:
>
> (c) an ADI account;
>
> (d) chattel paper;
>
> (e) an intermediated security;
>
> (f) an investment instrument;
>
> (g) a negotiable instrument.

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[221] Primary decision [266].
[222] ***Strategic Finance Ltd (in rec and in liq) v Bridgman*** [2013] NZCA 357; (2013) 3 NZLR 650.
[223] ***Re Langdon; Forge Group Limited (receivers and managers appointed) (in liq)*** [2017] FCA 170; (2017) 118 ACSR 434.
[224] PPSA s 10.

> Example: An account that is a credit card receivable is covered by paragraph (b). (emphasis added)

Strategic **and** ***Re Langdon***

183 ***Strategic*** was a case concerning a dispute over certain funds in the hands of a liquidator of an insolvent company. The insolvent company had been a property developer. The dispute was between the taxation commissioner and two companies (collectively, Strategic). Strategic was a secured creditor whose security agreement created a security interest in all the personal property of the property developer under the *Personal Property Securities Act 1999* (NZ) (PPSA (NZ)).[225]

184 The taxation commissioner claimed that all the relevant funds were recoverable by the commissioner as a preferential payment in the winding up of the property developer. Strategic said that the funds were caught by its PPSA (NZ) securities, and that the moneys were recoverable by Strategic.[226]

185 The funds in dispute were essentially as follows:

1. The property developer had paid certain contributions to a local authority which were subsequently found to have been unlawfully levied. The local authority refunded those moneys after the property developer had gone into liquidation.[227]

2. The property developer had also paid certain bond moneys to the local authority which, in the events which occurred after liquidation, the local authority was required to return. Those moneys were also paid to the property developer after the date of its liquidation.[228]

3. After the property developer went into liquidation, the commissioner 'by mistake' paid it a GST refund to which it was not entitled.[229]

4. Certain moneys held by the solicitors for the property developer in their trust account as at the date of the winding up of the property developer.[230]

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[225] ***Strategic*** [1] - [2], [6], [23].
[226] ***Strategic*** [21].
[227] ***Strategic*** [10] - [13].
[228] ***Strategic*** [14].
[229] ***Strategic*** [15] - [18].
[230] ***Strategic*** [20].

186 The court found that all the funds in dispute were after-acquired personal property, or the proceeds of after-acquired personal property, under Strategic's security agreement.[231] Strategic thus had the right to recover the funds unless Strategic's claims were defeated by the commissioner on the basis that the commissioner was a preferential creditor under the *Companies Act 1993* (NZ).[232]

187 The commissioner's claim to priority depended upon the funds being 'accounts receivable' under the *Companies Act* (NZ).[233] The term 'account receivable' in the *Companies Act* (NZ) was defined to have the same meaning as 'account receivable' in the PPSA (NZ).[234] Accordingly, it was necessary to consider the meaning of 'account receivable' in the PPSA (NZ).[235]

188 The PPSA (NZ) defined 'account receivable' as:[236]

> A monetary obligation that is not evidenced by chattel paper, an investment security, or by a negotiable instrument, whether or not that obligation has been earned by performance.

189 The ultimate question under the *Companies Act* (NZ) was whether any or all of the funds constituted 'accounts receivable' as at the date the property developer was put into liquidation.[237]

190 The court said:[238]

> In this context a 'monetary obligation' is an existing legal obligation on another party to pay an identifiable monetary sum to the company on an ascertainable date. The obligation must be legally enforceable by the company (at the date of the receivership or liquidation) on the basis that the other party has an existing liability to make the payment.
>
> …
>
> This definition may be applied to the funds at issue on the undisputed basis that the crucial date for determining whether the funds constituted 'accounts receivable' is the date on which [the property developer] was placed into liquidation, namely 21 November 2008. While the PPSA does not explicitly specify the date, the date on which the receiver or liquidator is appointed is generally adopted as the relevant date in

[231] ***Strategic*** [29].
[232] ***Strategic*** [30].
[233] ***Strategic*** [40].
[234] ***Strategic*** [41].
[235] ***Strategic*** [51] - [53].
[236] ***Strategic*** [42].
[237] ***Strategic*** [61], [86].
[238] ***Strategic*** [83], [86].

> relevant legislation, and has been accepted in other cases, and by the authors of the New Zealand text on receivership. We agree with that approach. (footnotes omitted)

191 The court made the following findings:

1. The property developer's right to recover the unlawful levies from the local authority had arisen before the date of its liquidation. The moneys refunded, albeit after the date of liquidation, were 'accounts receivable' and thereby recoverable by the commissioner.[239]

2. Unlike the unlawful levies, the bonds paid by the property developer to the local authority were lawfully received by the local authority at the time, and were not refundable until the local authority had been satisfied that the particular development was compliant with the local authority's standards. Compliance occurred after the date of liquidation. Accordingly, the property developer had no right to recover the bonds prior to the date of its liquidation. The bonds were not 'accounts receivable'.[240]

3. As at the date of liquidation, there was no obligation on the part of the commissioner to refund any GST to the property developer. The GST refund paid to the property developer 'by mistake' occurred after its liquidation. Those funds did not come within the definition of 'accounts receivable'.[241]

4. The money in the solicitor's trust account was payable to the property developer prior to the date of its liquidation. Hence those funds were 'accounts receivable' recoverable by the commissioner.[242]

192 The decision in ***Strategic*** was referred to by Gilmour J in ***Re Langdon***.[243] In ***Re Langdon***, Forge's receivers had obtained a tax refund from the Australian Taxation Office. The tax refund arose as a result of, and following, the termination of Forge's construction contracts following the appointment of the receivers. The question was whether the moneys the subject of the tax refund could be paid to the bank as the secured creditor of Forge pursuant to its security interest under the PPSA, or whether the receivers were required to pay the moneys to satisfy

[239] ***Strategic*** [87] - [91].
[240] ***Strategic*** [92] - [97].
[241] ***Strategic*** [98] - [100].
[242] ***Strategic*** [101] - [105].
[243] ***Re Langdon*** [150].

preferential employee entitlements pursuant to s 433 of the *Corporations Act*.[244]

193 Gilmour J observed, in effect, that s 433 of the *Corporations Act* applied where, relevantly, a receiver was appointed by a secured creditor with a 'circulating security interest', or where possession was taken or control was assumed on behalf of debenture holders of any property comprised in or subject to a 'circulating security interest'. In that event, the receiver or person assuming control must pay the stipulated preferred creditors 'out of property coming into his, her or its hands'.[245]

194 His Honour held, in effect, that the date for the fixing of the assets the subject of the statutory entitlement in favour of preferred creditors for the purposes of s 433 was the date of the appointment of the receivers and that, at that date, Forge had no right to the tax refund.[246] His Honour said:[247]

> Neither the chose in action nor the [tax] Refund existed at the time of any floating charge or when there were circulating assets. They were not property in the hands of the Receivers upon their appointment and are not caught by s 433.

195 His Honour also held, in effect, that, at the date of appointment of the receivers, the tax refund or its chose in action was not a 'circulating asset'. The principal submission addressed by his Honour was not in that regard whether there existed an 'account' for the purposes of s 340(1)(a) of the PPSA. Rather it was whether s 340(1)(b) applied.[248] His Honour held that s 340(1)(b) of the PPSA did not apply because Forge had not given the bank express or implied authority for the transfer of the tax refund to be made in the ordinary course of Forge's business free of the bank's security interest.[249] The alternative submission addressed by his Honour was whether the tax Refund was an 'account'. His Honour held that, in the circumstances, the tax Refund and chose in action arose only after the ordinary course of Forge's business had ceased. His Honour in that regard drew support from the decision in ***Strategic***

[244] ***Re Langdon*** [18] - [20], [82], [86].
[245] ***Re Langdon*** [45] - [47].
[246] ***Re Langdon*** [114] - [115].
[247] ***Re Langdon*** [115].
[248] Section 340(1)(b) of the PPSA applies to cases other than where s 340(1)(a) applies. Section 340(1)(a) of the PPSA applies to, amongst other things, accounts.
[249] ***Re Langdon*** [117] - [145].

concerning the mistaken GST payment which had been made after the property developer went into liquidation.[250]

Disposition

196 In ***Strategic*** and ***Re Langdon***, the assets found not to be available for the benefit of preferential creditors were characterised as effectively arising wholly from post-receivership, or post-liquidation, circumstances. Those cases do not bear upon, and provide no real assistance in, the disposition of the limited issues on the agreed facts in these proceedings.

197 In the present case, the performance guarantees provided for in GC 4.2 were, in effect, to secure payment of Hamersley's underlying claims. If Hamersley did not have the right to call on the guarantees in the events which had happened up to and including the appointment of voluntary administrators,[251] the obligation to repay the money received as a result of any subsequent wrongful call on the guarantees is, in our view, an 'account' for the reasons given below.

198 It is an obligation to pay an amount of money, being the proceeds of the wrongful call. Further, the obligation arises from the maintenance of bank guarantees to which Forge gave Hamersley rights of recourse under GC 4.2. The maintenance of the guarantees for recourse by Hamersley was an aspect of providing building services in the ordinary course of providing services of that kind (building services). Alternatively, the maintenance of the guarantees for recourse by Hamersley was itself a service provided by Forge in the ordinary course of a business of providing services of that kind (the securing of the performance of building work). Further or alternatively, the granting by Forge of the right to Hamersley to have recourse to the guarantees pursuant to GC 4.2 was the granting of a right in the ordinary course of a business of granting rights of that kind (the granting of rights to secure the performance of building work). Forge's contention that the 'Securities Claims' are not 'accounts' because Forge's business from which it earned income 'was construction work and engineering work' and not 'income [derived] from the provision of bank securities', cannot be accepted.[252]

199 We would uphold ground 3.

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[250] ***Re Langdon*** [149], [150].
[251] The effect of the agreed basis for determination of the preliminary issues.
[252] Appeal ts 174.

Security interests and the transfer of accounts under the GSA

200 This part of the reasons deals with matters raised by ground 2 and Forge's notice of contention. The notice of contention is to the effect that the statutory equities provided for in s 80(1)(a) of the PPSA have no application in the present case because s 80(1) only applies to outright transfers of an 'account', and not to an assignment by way of charge.

201 Section 80 of the PPSA operates in the context of the PPSA as a whole, including s 12. It also forms part of a suite of provisions in pt 2.7 of ch 2 of the PPSA. Those provisions are examined below.

Section 12 of the PPSA

202 Section 12 of the PPSA provides relevantly:

> **Meaning of security interest**
>
> (1) *A security interest means an interest in personal property provided for by a transaction that, in substance, secures* payment or *performance of an obligation* (without regard to the form of the transaction or the identity of the person who has title to the property).
>
> (2) For example, a security interest includes an interest in personal property provided by any of the following transactions, if the transaction, in substance, secures payment or performance of an obligation:
>
> (a) a fixed charge;
>
> (b) a floating charge;
>
> (c) a chattel mortgage;
>
> (d) a conditional sale agreement (including an agreement to sell subject to retention of title);
>
> (e) a hire purchase agreement;
>
> (f) a pledge;
>
> (g) a trust receipt;
>
> (h) a consignment (whether or not a commercial consignment);
>
> (i) a lease of goods (whether or not a PPS lease);
>
> (j) *an assignment*;

> (k) a transfer of title;
>
> (l) a flawed asset arrangement.
>
> (3) *A security interest also includes the following interests, whether or not the transaction concerned, in substance, secures payment or performance of an obligation*:
>
> (a) *the interest of a transferee under a transfer of an account or chattel paper*;
>
> (b) the interest of a consignor who delivers goods to a consignee under a commercial consignment;
>
> (c) the interest of a lessor or bailor of goods under a PPS lease.

203 Section 12(1) and s 12(2) of the PPSA refer to a security interest as an interest in personal property '*provided for by a transaction that, in substance, secures payment or performance of an obligation*'. By s 12(2)(j), an interest in, for example, an account (or chattel paper) which is the subject of an assignment which, in substance, secures payment or performance of an obligation, is a 'security interest'. The word 'assignment' is not defined, but as the form of the transaction is irrelevant (s 12(1)), any transfer of an account which, in substance, secures payment or performance of an obligation would, prima facie, be an 'assignment' within the meaning of s 12(2)(j). Also, some indication of the width of the word 'assignment' may be gleaned from s 263(1)(a), which refers to 'assignment (*however described*)'[253] and includes, for the purposes of the operation of the PPSA against potentially conflicting laws, both the 'transfer' of a security interest and the 'giving' of security interest.[254] Further, the language of 'whether or not' in the chapeau of s 12(3) indicates that a transaction involving a 'transfer of an account'[255] may be either one which in substance secures payment or performance of an obligation, or one which does not.

204 Section 12(3)(a) of the PPSA provides relevantly, in effect, that under a transaction involving the 'transfer' of an account (or chattel paper),[256] the interest of the transferee is also deemed to be a 'security interest', even if the transaction does not, in substance, secure payment

[253] Emphasis added.
[254] PPSA s 263(2).
[255] PPSA s 12(3)(a).
[256] Whilst the definition of an 'account' in the PPSA does not include 'chattel paper', for certain purposes the two are treated together. In broad terms, chattel paper is defined to mean a document which evidences a *monetary obligation* in goods and a security interest in the same goods: PPSA, s 10. An 'account debtor' is defined to mean a person who is obligated under either an account or chattel paper: PPSA, s 10.

or performance of an obligation. The word 'transfer' is broad and, in its ordinary meaning, would include an assignment. The transferor of an account under an outright transfer also comes within the definition of 'grantor'.[257]

205 Accordingly, the statutory regime under the PPSA regarding attachment, perfection and registration and priorities applies to outright transfers of accounts. On the other hand:

1. The *enforcement* regime in ch 4 of the PPSA, which, in broad terms, provides for rules about the rights and remedies available to a party to a security agreement[258] does not apply to outright transfers of accounts (or chattel paper).[259]

2. Unperfected outright transfers of accounts (or chattel paper), unlike transfers which secure the payment or performance of an obligation, do not vest in the grantor upon the insolvency of the grantor.[260]

3. An account (or chattel paper) which is the subject of an outright transfer is not a circulating asset.[261]

206 It is convenient, for ease of exposition, to refer to a 'security interest' within the meaning of s 12(1) and (2) as a 'actual security interest', and a 'security interest' within the meaning of s 12(3)(a) as a 'deemed security interest'.

Transfers of interests in collateral - pt 2.7 of the PPSA

207 Part 2.7 of the PPSA is within ch 2, which is headed 'General rules relating to security interests'.

208 Section 3 of the overview of the PPSA provides, in relation to ch 2:

> Chapter 2 sets out general rules relating to security interests. These include the following:
>
> (a) general principles relating to security agreements, security interests, attachment and perfection (Part 2.2);

[257] See PPSA s 10, par (d) of the definition of 'grantor'.
[258] PPSA s 108.
[259] PPSA s 109(1)(a).
[260] PPSA s 268(1)(a) read with s 266 and s 267.
[261] PPSA s 340(4A). On its terms, s 340(4A) also applies to a transfer of an account under a transaction which secures the payment or performance of an obligation, but it is unnecessary to decide that point for present purposes.

(b) interpretation provisions about possession and control (Part 2.3);

(c) rules about when attachment and perfection of security interests occurs in particular situations (Part 2.4);

(d) the circumstances in which personal property is taken free of a security interest in the property (Part 2.5);

(e) how to work out the priority between competing security interests (and in some cases, other sorts of interests) in personal property (Part 2.6);

(f) rules about the transfer of interests in collateral (Part 2.7).

209 Part 2.7 of the PPSA is in the terms set out below. Its provisions include reference to a 'security interest', which is defined in s 12 of the PPSA (see [202] above), and 'security agreement'. A 'security agreement' is defined to mean, amongst other things, an agreement by which a security interest is created, arises or is provided for.[262]

210 The provisions of pt 2.7 of the PPSA, on their ordinary meaning, prima facie apply to actual security interests and deemed security interests.

211 Section 78 of the PPSA provides:

78 Guide to this Part

This Part deals with the transfer of interests in collateral.

Collateral may be transferred despite a contrary provision in a security agreement (or a provision declaring the transfer to be a default), if the grantor and transferee consent, or by the operation of law.

The rights of a transferee of an account or chattel paper are subject to the contract between the account debtor and the transferor, and certain general law claims the account debtor may have against the transferor.

A modification of the contract (or a substituted contract) *between the account debtor and the transferor is effective against the transferee except in certain situations* (dishonesty, commercial unreasonableness or adverse effects on the transferee's rights or the transferor's ability to perform the contract).

A term in a contract between an account debtor and a transferor that imposes certain restrictions on the transfer of an account or

[262] PPSA s 10.

> *chattel paper binds the transferor to the extent of making the transferor liable in damages for breach of contract*, but is unenforceable against third parties. (emphasis added)

212 The opening line of s 78 explains the intended generality of the operation of pt 2.7. Prima facie, it means that pt 2.7 deals with transfers (whether by way of security or outright) of interests in 'collateral', ie, interests in personal property to which a security interest attaches. It would apply to an account assigned to secure the performance of an obligation (s 12(2)(j)), or transferred to a transferee outright (s 12(3)(a)), where the assignee's or transferee's interest is 'attached' under s 19(2).

213 The second paragraph of s 78 addresses the question left in some doubt under the general law, as to the effect of a prohibition against assignment or transfer.[263]

214 In this regard s 79 of the PPSA provides:

> **79 Transfer of collateral despite prohibition in security agreement**
>
> (1) *If collateral would be able to be transferred (including by sale, by creating a security interest* or under proceedings to enforce a judgment) *but for a provision in a security agreement* prohibiting the transfer or declaring the transfer to be a default, *the collateral may be transferred*, despite the provision:
>
> (a) *by consent between the grantor and the transferee*; or
>
> (b) *by operation of law*.
>
> …
>
> (2) A transfer mentioned in subsection (1) does not prejudice the rights of the secured party under the security agreement or otherwise, including the right to treat a prohibited transfer as an act of default. (emphasis added)

215 The effect of s 79 is, relevantly for present purposes, that if personal property to which a security interest is attached (collateral) would be able to 'transferred' (including by outright assignment or by assignment by the creation of a further security interest in it), but for a

[263] See, eg, the discussion in Tolhurst GJ, *The Assignment of Contractual Rights* (2nd ed, 2016) [6.82] 252 - 258.

provision in a security agreement prohibiting it, the property to which the security interest is attached may be transferred:

(a) by consent between the grantor (of the original security interest), and the transferee (or assignee); or

(b) by operation of law,

but that does not prejudice the secured party under a security agreement from treating the transfer as an act of default.

216 The ordinary meaning of the third paragraph of s 78 is that the rights of the transferee of an account (whether an assignee under s 12(2)(j) or otherwise under s 12(1), or an outright transferee under s 12(3)(a)) are subject to the rights between the account debtor (the person obligated under the account - for convenience 'obligor') and the transferor (in this context, and relevantly for present purposes, the person to whom the obligation is owed - for convenience the 'obligee'), and certain general law claims between the obligor and the obligee.

217 In this regard, s 80(1), (2), (7) and (8) of the PPSA provide:

> **80 Rights on transfer of account of chattel paper--rights of transferee and account debtor**
>
> *Rights of transferee subject to contractual terms and defences*
>
> (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)*; and
>
> (b) *any other equity*, defence, remedy or claim *of the account debtor against the transferor (including* a defence by way of *a right of set-off) that accrues before the first time when payment by an account debtor to the transferor no longer discharges the obligation of the account debtor under subsection (8)* to the extent of the payment.
>
> (2) *Subsection (1) does not apply if the account debtor makes an enforceable agreement not to assert defences to claims arising out of the contract.*

> …
>
> *Payment by account debtor after transfer*
>
> (7) *If an account* or chattel paper *is transferred, the account debtor may continue to make payments under the contract to the transferor*:
>
> (a) *until the account debtor receives a notice that*:
>
> (i) *states that the amount payable* or to become payable under the contract *has been transferred; and*
>
> (ii) states that *payment is to be made to the transferee*; and
>
> (iii) *identifies the contract* (whether specifically or by class) under which the amount payable is to become payable; or
>
> (b) after receiving a notice under paragraph (a) (other than a notice from the transferor), if:
>
> (i) the account debtor requests the transferee to provide proof of the transfer; and
>
> (ii) the transferee fails to provide proof before the end of 5 business days after the day of the request.
>
> (8) *Payment by an account debtor to a transferee in accordance with a notice* under paragraph (7)(a) (including in the circumstances described in paragraph (7)(b)) *discharges the obligation of the account debtor to the extent of the payment*. (emphasis added)

218 The parenthesised words in the chapeau of s 80(1) '(including a secured party or a receiver)' tend to confirm that the provision applies, not only to outright transferees, but also to a transferee under a transaction which, in substance, secures payment or performance of an obligation. The term 'secured party' is defined to include, in effect, a trustee where the holders of the obligations guaranteed or provided under a security agreement are represented by a trustee.[264] The word 'receiver' is not defined, but in the context of 'a law about security interests in

[264] Like ANZFS in this case.

personal property',[265] the word 'receiver' in the phrase 'a secured party or a receiver' would ordinarily be understood to refer to a receiver and manager appointed by the secured party to take control of and realise the property for the benefit of the secured party. The phrase '(including a secured party or a receiver)' is inapt to refer to an outright assignee.

219 The operation of s 80 in these respects is, in broad terms, not dissimilar to the general law position. As noted earlier, a floating chargee takes subject to the equities prior to the crystallisation of the charge.[266]

220 The fourth paragraph of s 78 (in general terms and relevantly for present purposes) is to the effect that a modification of the contract (or substituted contract) between the obligor and the obligee is effective against the transferee in certain situations, even after notice of the transfer. In that regard, it displaces the general law principle.[267] Section 80(3) - (6) provides:

> *Effect of modification or substitution of contract on transferee*
>
> (3) *Unless the account debtor has otherwise agreed, a modification of, or substitution for, the contract between the account debtor and the transferor is effective against the transferee (including a secured party or a receiver) if*:
>
> (a) *the account debtor and the transferor have acted honestly* in modifying or substituting the contract; and
>
> (b) the manner in which the *modification* or the substitution is made is *commercially reasonable*; and
>
> (c) the modification or substitution *does not have a material adverse* effect on:
>
> (i) *the transferee's rights under the contract*; or
>
> (ii) *the transferor's ability to perform the contract*.
>
> Note: For the meaning of modification, see section 10.

[265] PPSA s 3, '*Overview*'.
[266] See [58] above.
[267] ***Brice v Bannister*** (1878) 3 QBD 569, 581.

(4) *Subsection (3) applies*:

(a) *to the extent that a transferred right to payment* arising out of the contract *has not been fully earned by performance*; and

(b) *even if there has been notice of the transfer to the account debtor*.

(5) *If a contract has been modified* or substituted in the manner described in subsection (3), *the transferee obtains rights that correspond to the rights of the transferor under the contract as modified or substituted*.

(6) *Nothing in subsections (3) to (5) affects the validity of a term* in a transfer agreement *that provides that a modification* or substitution mentioned in subsection (3) *is a breach of contract by the transferor*. (emphasis added)

221 The fifth paragraph of s 78 is, relevantly for present purposes, to the effect that a term in a contract between the obligor and the obligee that imposes certain restrictions on the transfer of an account binds the obligee to the extent of making the obligee liable in damages for breach of contract, but is unenforceable against third parties. It means, in effect (where it applies), that the obligor cannot control, by a clause prohibiting assignment of the chose, the obligee's right to transfer or assign the chose. It does not apply to a term prohibiting the transfer of the whole of an account, for currency, that arises from the grant of a right under a construction contract.[268]

222 In this regard, s 81 provides:

81 Rights on transfer of account or chattel paper--contractual restrictions and prohibitions on transfer

Scope

(1) *This section applies to a term in a contract if*:

(a) *the contract is between an account debtor and a transferor*; and

(b) *the term restricts or prohibits transfer of any of the following for currency* due or to become due:

[268] The term 'construction contract' is not defined in the PPSA, but it presumably includes a building contract.

> (i) *the whole of an account that is the proceeds of inventory*;
>
> (ii) *the whole of an account that arises from granting a right (other than a right granted under a construction contract), or providing services (other than financial services), in the ordinary course of the business of granting rights or providing services of that kind* (whether or not the account debtor is the person to whom the right is granted or the services are provided);
>
> (iii) *the whole of an account that is the proceeds of an account mentioned in subparagraph (ii)*;
>
> (iv) chattel paper.
>
> *Statutory restriction on contracts*
>
> (2) *The term in the contract*:
>
> (a) *is binding on the transferor, but only to the extent of making the transferor liable in damages for breach of contract*;
>
> (b) *is unenforceable against third parties*. (emphasis added)

223 Read in the context of pt 2.7 and in the context of the PPSA as a whole, the bank's security interest in Forge's claims are subject to s 80(1)(a) of the PPSA. To this extent, ground 2 should be upheld and Forge's notice of contention, referred to below, should be dismissed.

Forge's notice of contention

224 By its notice of contention, Forge contends that s 80 of the PPSA, within the suite of provisions in pt 2.7 of ch 2, applies only to an outright transfer of an account under s 12(3)(a), and has no application to the security interest granted by Forge by way of charge over its claims. It submits, in effect, that:

1. Forge's claims became subject to the security interest and charge in after-acquired property that attached without specific appropriation by the grantor, and 'thus' Forge's claims were not transferred to the bank.

2. The language of 'transfer' in s 80 picks up, and is intended to apply only to, outright transfers under s 12(3)(a).

3. Had s 80(1) been intended to operate upon an assignment by way of security, different language like that used in relation to liens in the PPSA would have applied. Section 80(1)(b) and (c) exclude liens (in general terms) arising under statutory and general law. The table in s 8(2) refers, as an exception, to s 73, which, in turn, refers expressly to priority over a 'security interest'. It is said, in effect, that the absence of a reference to 'security interest' in s 80(1) is telling.

4. The reference to a 'receiver' in the chapeau of s 80(1) is no more than a reference to someone who receives a security interest pursuant to a transaction that is a 'transfer'.

225 Forge also refers to and relies on ***In re Printz***.[269]

226 Forge's submissions cannot be accepted. As to the first point, the attachment to after-acquired property in the case of a transfer of an account in a transaction which secures the payment or the performance of an obligation does not cease to be a 'transfer' within the meaning of s 12(2)(j). As to the second point, as indicated above in [204], 'transfer' is wide enough to comprehend an assignment by way of security.

227 As to the third point, s 73 creates a priority regime between, in effect, security interests under the PPSA and non-consensual security interests arising under the general law, or Commonwealth, or State law. The starting point for s 73 is different from that relating to the transfer of an account. By s 12(3)(a), the transfer of an account is effectively deemed to be a 'security interest' under the PPSA. Moreover, Forge's submission overlooks the point that in relation to transfers of an account, where the PPSA wishes to make clear that it is not speaking of an outright transfer, it adds the words 'that does not secure payment or performance of an obligation'.[270] The outright transfer of an account pursuant to s 12(3)(a) is more of an 'add-on', which enlarges the operation of the PPSA so as to apply also, where indicated, to transfers or assignments which do not secure the payment or performance of an obligation. As to the fourth point, that submission involves a misreading of the word 'receiver' in this context.

[269] ***In re Printz*** (2012) 478 BR 876.
[270] PPSA s 109(1)(a) and s 268(1)(a).

228 In the case of ***Printz***, CNH made loans to Mr and Mrs Printz. Mr and Mrs Printz gave CNH security over specific crops, and the proceeds from those crops. They also they granted CNH a security interest in their present and after-acquired receivables. Trainor purchased crops from Mr and Mrs Printz. Mr and Mrs Printz delivered the crops in accordance with the contracts. However, Trainor withheld part of the purchase price (Crop Receivable), and applied those moneys to debts which Mr and Mrs Printz owed Trainor. CNH sought, in effect, a declaration that its security interest in the Crop Receivable (owed to Mr and Mrs Printz from the purchase price) took priority over any interest of Trainor.[271]

229 Trainor defended CNH's claim on the basis, amongst other things, that it had a contractual right of set-off against Mr and Mrs Printz of which it had the benefit, as against CNH, through the operation of the equivalent (in very general terms) of s 80(1) of the PPSA. The court held that the s 80(1) equivalent applied not only to outright assignments, but also to assignments by way of security.[272] To that extent, the case is against Forge.

230 The court also held that the s 80(1) equivalent applied only to assignments of *existing* receivables and, accordingly, CNH's charge (for want of a better word) of after-acquired receivables did not operate as an assignment of the Crop Receivable for the purposes of the s 80(1) equivalent. The court referred to previous authority to that effect. The case to this extent provides some support for Forge's contention. However, it appears that the result in ***Printz*** was also significantly influenced by two further considerations. The court considered it to be important that the crop purchase contracts, by their terms, precluded Mr and Mrs Printz from assigning their rights under the crop contracts. The court also regarded it as significant that Trainor had actual knowledge of CNH's security interest at the time that it entered into the purchase contracts.[273]

231 Further, in ***Bank of Waunakee v Rochester Cheese Sales Inc***[274] (a case referred to in ***Printz***), the court also considered the operation of the relevant equivalent (in very general terms) of s 80(1) of the PPSA. In that case, a company (RCS) was in the business of purchasing and reselling cheese. Another company (Kase) was also in a similar business.

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[271] ***Printz*** (878 - 879).
[272] ***Printz*** (886).
[273] ***Printz*** (886 - 887).
[274] ***Bank of Waunakee v Rochester Cheese Sales Inc,*** 906 F 2d 1185 (7th Cir, 1990).

> The two companies shared a business relationship. There were transactions between the two companies in March to early June 1988 under which Kase owed RCS $97,482. On 10 June 1988, it was agreed that the cross-demands would be set-off, and that RCS would pay Kase the balance of $22,643, which it did. *Some months earlier*, a bank had lent $1.434 million to Kase, and had perfected a security interest in Kase's inventory and accounts receivable. Kase went into insolvency in due course. The bank claimed against RCS the amount of the receivable that had been the subject of the set-off, $97,482. RCS resisted the bank's claim on the basis of the equivalent (in general terms) of s 80(1) of the PPSA. The bank contended that the s 80(1) equivalent had no application to its charge (for want of a better word). The court found against the bank. The court held that the s 80(1) equivalent applied. The court noted that 'in other states, the courts and the [PPSA equivalent] have made no distinction between a party with a security interest in a debtor's accounts receivable and party who is an assignee of a debtor's accounts receivable'.[275] The court did not, in terms, refer to the receivables being after-acquired property, but that would appear to be the case on the facts.

232 The cases referred to ultimately provide no definitive guidance to the operation of s 80(1)(a) of the PPSA. For the reasons given earlier, s 80(1)(a) applies to the bank's security interest in respect of Forge's claims.

Hamersley's reliance on contractual set-off

233 This part of the reasons deals with Hamersley's reliance on contractual set-off and ground 1 of the appeal.

234 Hamersley described ground 1 in these terms:[276]

> The [judge's] decision is inconsistent with the terms of the Contracts, in that it does not give effect to the provisions which have the effect that Forge's entitlements are those, if any, remaining *after* taking into account the amounts to which Hamersley is entitled. The 'Collateral' the subject of the GSA was the end result, after setting off Forge's claims against Hamersley against Hamersley's claims against Forge. (emphasis in original)

235 Hamersley's submissions appeared to have as their focus Hamersley's rights of contractual deduction under General

[275] ***Rochester*** (1190).
[276] Appellant's written submissions, par 9; WB 9.

Condition 16.12 of the West Angelas Contract and its equivalent in the Cape Lambert Contract.

236 The following provides, in general terms, a broad outline of the most relevant contractual provisions.[277]

Contractual terms

237 The Contract is a lump sum contract. The 'Employer' in the Contracts is Hamersley and the 'Contractor' is Forge. By cl 1 and cl 2 of the Formal Instrument Agreement, the Contractor agrees to carry out the Work under the Contract in accordance with the Contract and the Employer agrees to pay a lump sum Contract Price.[278]

238 By GC 12 (read with the definition of Acceptance in GC 1.1), the separable parts of the works are to be completed in accordance with the Contract by its specified dates.[279] By GC 13, the Contractor must pay liquidated damages for each day there is a delay in achieving Acceptance of the works.[280]

239 By GC 16.1, the Employer must pay for the works on the basis of the Contract Price, subject to adjustments in accordance with the Contract.[281]

240 The Contract contains a number of provisions by which the Contract Price may be adjusted. There are procedures for the Contractor to make claims which may result in an increase to the Contract Price.[282] In relation to certain types of claim by the Contractor, there is a procedure by which the Employer is first required to make a determination under GC 3.5 which, if favourable to the Contractor, results in the additional costs claimed being added to the Contract Price.[283] By GC 3.5(d), if the Contractor is unhappy with the determination by the Employer, the matter may go to Dispute Resolution in accordance with GC 22. The Contract also provides for reductions to the Contract Price in specified circumstances and subject to the Employer making a determination to that effect under GC 3.5.[284] The Contract Price may also be adjusted

[277] It is sufficient, for present purposes, to refer to the terms of the West Angelas Contract.
[278] GB 285.
[279] GB 287, 358 - 360.
[280] GB 360.
[281] GB 367.
[282] See, eg, GC 2.7(c), (e), GC 4.23(c), GC 4.24, GC 7.3(f), GC 8.9(a).
[283] See, eg, GC 4.23(d), GC 7.3(g), GC 8.9(b).
[284] See, eg, GC 14.5(b)(ii).

(upwards or downwards) with respect to variations in accordance with the Employer's determination under GC 3.5.[285]

241 The Contract Price (as adjusted) is payable in accordance with the provisions of GC 16. In broad terms, GC 16 requires Progress Claims to be submitted to the Employer, the certification by the Employer of its opinion as to the amount due to the Contractor (or to the Employer) pursuant to the Progress Claim, and payment within a specified number of days of certification, subject to specified rights of deduction by the Employer under GC 16.12. The relevant provisions are set out in [245] below.

242 The Employer may, without prejudice to its other rights or remedies, terminate the Contract under GC 17. The Employer's rights of termination arise where, amongst other things, an Event of Insolvency occurs. An Event of Insolvency is defined to include the appointment of administrators. By GC 17.3, the Employer has a range of rights or remedies consequential upon termination, including taking over the works.[286] By GC 17.10, termination of the Contract operates without prejudice to any rights accrued to either party prior to termination.[287]

243 By GC 19.6, subject to certain specified exceptions, the Contractor's total liability to the Employer under or in connection with the Contract does not exceed the Contract Price. The exceptions include where there is fraud, deliberate fault or reckless misconduct, and the Contractor's obligation to pay liquidated damages for delay.[288]

244 There are Dispute Resolution provisions in GC 22.2 - 22.12. By GC 22.4, the parties' obligations under the Contract continue despite the existence of a Dispute.[289] By GC 22.12, the referral of a matter under GC 22 does not affect the obligations of the parties under the Contract.[290]

GC 16.4, 16.5 and 16.12

245 GC 16.4, 16.5 and 16.12 provide:[291]

[285] See, eg, GC 15.6.
[286] See also GC 17.4 - 17.9.
[287] GB 378.
[288] GB 382.
[289] GB 395 - 396.
[290] GB 396.
[291] GB 369 - 370, 372.

16.4 Payment Certificates

(a) *[Hamersley] must, within 15 Business Days after receiving a Progress Claim and supporting documents, assess the Progress Claim and give to [Forge] a Payment Certificate showing [Hamersley's] opinion of the money due from [Hamersley] to [Forge] (or vice versa) pursuant to the Progress Claim* and the reasons for any difference with supporting particulars. *Subject to Sub-Clause 16.12 [Right of Set Off], payments due must not be withheld, except that*:

(i) if any thing supplied or work done by [Forge] is not in accordance with the Contract, the cost of rectification or replacement may be withheld until rectification or replacement has been completed in accordance with the Contract;

(ii) if [Forge] was or is failing to perform any work or obligation in accordance with the Contract, and had been so notified by [Hamersley], the value of this work or obligation may be withheld until the work or obligation has been performed in accordance with the Contract; or [sic]

(b) *Without limiting paragraph 16.4(a)(a) [sic], [Hamersley] may, at any time, issue a Payment Certificate (including for the purpose of making any correction or modification that should properly be made to any amount previously considered due) whether or not at a time otherwise provided for the issuing of certificates under the Contract* and the [Hamersley] or [Forge], as the case may be, must pay the amount so certified within 10 Business Days of that certificate.

(c) *Payment does not indicate or evidence*:

(i) *[Hamersley's] acceptance, approval, consent or satisfaction with the work* (including any admission or evidence that such work has been executed satisfactorily); or

(ii) the value of such work,

but is payment on account only.

16.5 Timing of Payments

(a) Subject to paragraph 16.5(b) and *except as otherwise stated in Sub-Clause 16.12* [Right of Set Off], *[Hamersley] shall pay to [Forge]:*

(i) *the amount which is due in respect of each Progress Claim, other than the Final Progress Claim, as set out in the relevant Payment Certificate within 15 Business Days* after issuing such certificate; and

(ii) any final amount due, as set out in the Final Certificate, within 30 Business Days after issuing such certificate under Sub-Clause 16.8 [Final Progress Claim].

(b) Payment of any such amount due must be made into a bank account, nominated by [Forge], in the Country.

…

16.12 Right of Set Off

[Hamersley] may deduct from monies otherwise due to [Forge]:

(a) *any debt or other monies due*; and

(b) *any Claim to money which [Hamersley] may have against [Forge] whether for damages (including liquidated damages) or otherwise*,

under or in connection with the Contract. (emphasis added)

246 GC 1.1 defines 'Claim' as:[292]

Claim *means any claim*, notice, *demand*, suit, account, action, proceeding, arbitration, litigation (including reasonable legal costs), investigation or judgment of any nature, absolute or contingent, liquidated or unliquidated, whether known or unknown, *whether directly or indirectly*, or whether in law, contract, tort, negligence, statute (including strict liability) *or any claim for any liability, damages, losses*, costs, expenses, expenditure, charge, *compensation*, *payment*, remedy, *debt*, lien, relief or payment, or relief from any obligation under the Contract including:

…

[292] GB 288.

> (b) *adjustment to the Contract Price or any other amount payable under or in connection with the Contract*;
>
> …
>
> whether under the Contract or otherwise at law or in equity (including under statute, in tort (including negligence) or for restitution).

The primary judge's findings

247 The primary judge found that Hamersley's rights under GC 16.12 were not only exercisable in respect of moneys claimed and certified for payment.[293] The primary judge also found that GC 16.12 is not a 'self-executing'[294] mechanism for set-off. His Honour found that Forge's rights to be paid money due under the Contracts were unaffected by Hamersley's contractual rights to set-off under GC 16.12, unless and until Hamersley exercised those set-off rights. His Honour found that Hamersley did not exercise its rights to set-off before the administrators were appointed.[295] His Honour found that s 553C of the *Corporations Act* operates to exclude any form of contractual set-off.[296]

The parties' submissions

248 Hamersley contends, in effect, that Forge's contractual rights against Hamersley, over which the bank took security under the GSA, are subject to Hamersley's rights against Forge under the Contract and, in particular, Hamersley's right of deduction under GC 16.12.[297] Hamersley contends that the primary judge failed to have due regard to the operation of GC 16.12 with respect to 'Claims', and that payment was on account only.[298] Hamersley does not challenge the primary judge's finding to the effect that GC 16.12 is not a 'self-executing' mechanism for set-off.

249 Forge contends, in effect, that the primary judge was correct for the reasons his Honour gave. Forge also appears to contend that there could be no subsequent deduction under GC 16.12 against a Payment Certificate that had been issued. [299] Forge says that GC 16.12 operates on the basis that the deduction by Hamersley has to occur effectively upon the issue of the Payment Certificate itself under GC 16.4(a). Forge

[293] Primary decision [143].
[294] Primary decision [139].
[295] Primary decision [139].
[296] Primary decision [210].
[297] Appellant's written submissions, pars 13 - 16; WB 10 - 11.
[298] Appellant's written submissions, pars 18 - 23; WB 11 - 13.
[299] Appeal ts 157 - 160.

submits that if a subsequent debt or other monies due or a Claim were to arise which Hamersley would seek to deduct, Hamersley must issue a revised Payment Certificate under GC 16.4(b) and effectuate the deduction that way.[300] Forge emphasises that cashflow is the 'life-blood' of contractors.[301]

Disposition

250 It is unnecessary to determine, for present purposes, the full scope and effect of GC 16.12 in the context of its operation of the contract as a whole. Insofar as GC 16.12 operates as a set-off,[302] it can have no application given that, as we have found, s 553C of the *Corporations Act* applies. That provision requires a once-and-for-all final account to be taken of the parties' claims arising from their mutual dealings. For the reasons given earlier, where s 553C applies to the circumstances of the case, it applies exclusively to other rights of set-off. On this basis, we would dismiss ground 1.

251 Further, insofar as ground 1 alleges that if the bank could recover Forge's claims for its own benefit, GC 16.12 would operate to bring about a permanent reduction or extinguishment of Forge's claims to the extent of the amount deducted, we would reject that contention. GC 16.12, where it applies, only operates as a provisional deduction, effectively pending resolution of the underlying disputes.[303]

252 It is strictly unnecessary to deal with Forge's submission referred to in [249] above. Nevertheless, for the following reasons, it seems to us that the point has no substance.

253 The phrase 'otherwise due to the Contractor' in the chapeau of GC 16.12 is evidently designed to refer to, at least, an amount certified by the Employer as, in its opinion, 'due' for payment to the Contractor under GC 16.4 which is payable under GC 16.5. In other words, it applies, at least, to an amount certified as due under a Payment Certificate under GC 16.4 which has become payable under GC 16.5. GC 16.12 does not operate on the basis that any deduction under that clause has to be made either at the point of issuing a Payment Certificate under GC 16.4(a), or not at all. GC 16.4(a) makes it plain that payment

[300] Appeal ts 160.
[301] Respondent's written submissions, pars 16 - 17; WB 36.
[302] The provision in GC 16.12 is very similar to the provision considered by the Victorian Court of Appeal in ***Golf Australia Holdings Ltd v Buxton Construction Pty Ltd*** [2007] VSCA 200 [18], [23].
[303] ***Golf*** [18], [23]; ***SL Sethia Liners Ltd v Naviagro Maritime Corporation (The 'Kostas Melas')*** [1981] 1 Lloyd's Rep 18, 26.

of a Payment Certificate may not be withheld except as specified in subpars (i) and (ii), but may be the subject of contractual adjustment under GC 16.12. The consideration that cashflow is the 'life-blood' of the Contractor cannot serve as a basis for contradicting the plain words of the clause. GC 16.4(b) is expressed to be without limitation to GC 16.4(a). Further, the right under GC 16.4(b) may be exercised independently of the exercise of the right under GC 16.12, and vice versa: GC 1.20. GC 16 read as a whole does not operate to require, in effect, any deduction under GC 16.12 to be the subject of, and effectuated only by, a revised Payment Certificate issued under GC 16.4(b).

Conclusion

254 Leave to appeal should be granted.

255 The appeal should be upheld to the extent indicated in relation to grounds 2, 3, 4 and 5.

256 The notice of contention should be dismissed.

257 On the basis of these reasons, and subject to hearing from the parties, we would answer the preliminary questions for present purposes as follows:

1. As to question 1, the matters pleaded by Forge do not, together or separately, preclude s 553C of the *Corporations Act* from operating to set-off Hamersley's claims against Forge's claims. The application of s 553C of the *Corporations Act* to Hamersley's claims and Forge's claims precludes Hamersley from setting off those claims otherwise than as provided by that section.

2. As to question 2, yes, under s 553C of the *Corporations Act*.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

CL
ASSOCIATE TO THE HONOURABLE JUSTICE MURPHY

21 SEPTEMBER 2018