

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2013 0041

IN THE MATTER OF WULGURU RETAIL  
INVESTMENTS PTY LTD (In Liquidation)  
(ACN 084 836 859)

BETWEEN

DAVID RAJ VASUDEVAN as Joint and Several  
Liquidator of WULGURU RETAIL  
INVESTMENTS PTY LTD (In Liquidation)  
(ACN 084 836 859) & ORS

Appellants

v

BECON CONSTRUCTIONS (AUSTRALIA)  
PTY LTD (ACN 092 361 165)

First Respondent

and

OWENLAW MORTGAGE MANAGERS LTD  
(ACN 005 408 766)

Second Respondent

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JUDGES

NETTLE, BEACH JJA and McMILLAN AJA

WHERE HELD

MELBOURNE

DATE OF HEARING

4 February 2014

DATE OF JUDGMENT

24 February 2014

MEDIUM NEUTRAL CITATION

[2014] VSCA 14

JUDGMENT APPEALED FROM

*Vasudevan & Ors v Becon & Anor* (Unreported, Supreme Court of Victoria, Randall AsJ, 11 March 2013)

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CORPORATIONS - Winding up in insolvency - Unreasonable director related transaction - Whether agreement by company to assume joint liability for obligations owed by director to third party and to grant mortgage to secure performance of assumed liability constituted unreasonable director related transaction within meaning of s 588FDA of *Corporations Act 2001* (Cth) - Whether appropriate to avoid transaction *ab initio* - *Ziade Investments Pty Ltd v Welcome Homes Real Estate Pty Ltd & Anor* (2006) 57 ACSR 693, distinguished; *Re Great Wall Resources Pty Ltd (in liq)* [2013] NSWSC 354, doubted and not followed - *Corporations Act 2001* (Cth) ss 9, 588F, 588FA, 588FB, 588FD, 588FDA, 588FE, 588FG.

WORDS AND PHRASES - 'On behalf of'; 'For the benefit of'.

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Appearances:

Counsel

Solicitors

For the Appellants

Mr Leslie Glick SC with  
Ms L H Kirwan

SBA Law

For the First Respondent

Mr P D Crutchfield SC with  
Mr A A Segal

McKean Park Lawyers

For the Second Respondent

No appearance

NETTLE JA:

1           This is an appeal from a judgment of an Associate Judge. It concerns the meaning of s 588FDA of the *Corporations Act 2001* (Cth) ('the Act').<sup>1</sup> The question is what is meant by the words a 'payment, disposition or issue [of securities]' by a company to 'a person on behalf of, or for the benefit of', a director of the company. The Associate Judge held that it does not extend to a mortgage given by a company to a creditor of a director of the company in consideration of a covenant by the creditor not to sue the director. For the reasons which follow, I take a different view.

### *The facts*

2           At relevant times, Warren Thompson was the sole director and shareholder of Wulguru Pty Ltd ('Wulguru') and two other companies, Richmond Commercial Pty Ltd ('Richmond') and Mulgrave Commercial Pty Ltd ('Mulgrave').

3           On 23 February 2011, Mr Thompson, Wulguru, Richmond and the first respondent, Becon Constructions (Australia) Pty Ltd ('Becon') entered into a Deed to restructure debts which were owed to Becon by Mulgrave and Richmond and guaranteed by Mr Thompson. The Deed recorded that it was entered into at the request of Mr Thompson and Wulguru in circumstances where Mr Thompson had guaranteed the obligations of Mulgrave and Richmond; Mulgrave and Richmond had defaulted in the performance of those obligations; and Becon had instituted proceedings against Mr Thompson as guarantor to recover the amounts due by Richmond and Mulgrave.

4           Before entering into the Deed, Wulguru had no obligation or liability to Becon. Perforce of the Deed, Wulguru assumed a joint and several liability to pay Mulgrave's debt to Becon (then \$939,812.58) and a joint responsibility to pay interest on the debt accruing at the rate of \$6,170.86 per month. In accordance with the Deed, Wulguru also executed a mortgage ('the Mortgage') over real property ('the

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<sup>1</sup> Which is set out below in [8].

mortgaged property') in favour of Becon as security for the performance of Wulguru's obligations under the Deed. The Deed provided that, upon execution of the Mortgage, Becon would discontinue the proceedings against Mr Thompson and release and forever discharge him from various liabilities.

5           On 21 March 2012, it was ordered that Wulguru be wound up in insolvency and that the first and second appellants ('the Liquidators') be appointed as liquidators of Wulguru.

6           Before the appointment of the Liquidators, Wulguru entered into a contract of sale to sell certain of the mortgaged property (lots 348 and 349). On learning that Becon and Owenlaw Mortgage Managers Ltd ('Owenlaw') each laid claim to the proceeds of sale, the Liquidators obtained those companies' consent to the proceeds being held in trust in an interest bearing account pending determination of their respective entitlements ('the Escrow Account').

7           On 20 July 2012, the solicitors for the Liquidators wrote to Becon's solicitors setting out their view that the Deed and the Mortgage constituted unreasonable director-related transactions and thus were voidable pursuant to s 588FE of the Act. The letter invited Becon to relinquish any and all of its claim to the funds in the Escrow Account. A response was received from Becon's solicitors on 30 July 2012, the same day that the Liquidators filed the originating process. Becon refused to relinquish its claim over the funds in the Escrow Account.

### *The relevant legislation*

8           Section 588FDA of the Act provides that:

#### **Unreasonable director-related transactions**

- (1) A transaction of a company is an unreasonable director-related transaction of the company if, and only if:
  - (a) the transaction is:
    - (i) a payment made by the company; or

- (ii) a conveyance, transfer or other disposition by the company of property of the company; or
- (iii) the issue of securities by the company; or
- (iv) the incurring by the company of an obligation to make such a payment, disposition or issue;

and

(b) the payment, disposition or issue is, or is to be, made to:

- (i) a director of the company; or
- (ii) a close associate of a director of the company; or
- (iii) a person on behalf of, or for the benefit of, a person mentioned in subparagraph (i) or (ii);

and

(c) it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:

- (i) the benefits (if any) to the company of entering into the transaction; and
- (ii) the detriment to the company of entering into the transaction; and
- (iii) the respective benefits to other parties to the transaction of entering into it; and
- (iv) any other relevant matter.

The obligation referred to in subparagraph (a)(iv) may be a contingent obligation.

Note: Subparagraph (a)(iv) -- This would include, for example, granting options over shares in the company.

(2) To avoid doubt, if:

- (a) the transaction is a payment, disposition or issue; and
- (b) the transaction is entered into for the purpose of meeting an obligation the company has incurred;

the test in paragraph (1)(c) applies to the transaction taking into account the circumstances as they exist at the time when

the transaction is entered into (rather than as they existed at the time when the obligation was incurred).

- (3) A transaction may be an unreasonable director-related transaction because of subsection (1):
- (a) whether or not a creditor of the company is a party to the transaction; and
  - (b) even if the transaction is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

9 Section 9 of the Act provides, inter alia, that, unless the contrary intention appears:

‘on behalf of’ includes on the instructions of; and

‘benefit’:

- (a) means any benefit, whether by way of payment of cash or otherwise; and
- (b) when used in Division 2 of Part 2D.2 (sections 200 to 200J) – has the meaning given by section 200AB.

### *The Associate Judge's reasons*

10 The Associate Judge held that, although he considered Mr Thompson had received a benefit as the result of Wulguru entering into the Deed and the Mortgage, neither attracted the operation of s 588FDA, because:

I construe s 588FDA(1)(b)(iii) firstly to expand the class of recipients caught by the section, not to define the nature of the transaction. Secondly I construe the subsection to mean that the payment, disposition or issue received by Becon must be on behalf of or for the benefit of the director. That benefit, using the s 9 definition, refers to instructions given by the director to Becon, not to the company, that the holding by Becon must be for the benefit of Mr Thompson, the director, and not merely that a benefit was derived by the director from the transaction. I see no reason to embark upon the distinction between direct and indirect benefit as referred to by Sanderson M. It is sufficient to determine that Becon does not act upon the instructions of Mr Thompson and takes the mortgage for its own benefit.<sup>2</sup>

11 His Honour added that he regarded the construction of the section contended

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<sup>2</sup> Reasons, 89.

for by the Liquidators as improbable, because:

By adopting that construction the potential reach of the section [would be] to catch all transactions wherein instructions are given to the company either personally by a director or thorough the usual operation chain. The task of the court would be then ... to consider ... if the transaction was unreasonable or not within the meaning of subsection (c) of 588FDA.

Secondly the range of the section would be expanded to eliminate, in most instances, the need to pursue claims under the different regimes in Part 5.7B and [would have] the direct effect of eliminating available defences which might otherwise be available to a creditor or recipient of the transaction.

That was not the intention of Parliament save in circumstance where it was the director or close associate of the director or a person or entity receiving on behalf of or for the benefit of the director. I use the words 'behalf of or for the benefit' loosely without regard to the definition or the words of the section.<sup>3</sup>

### *The parties' contentions*

12           The Liquidators contended before the Associate Judge, and again before this court,<sup>4</sup> that the Deed and Mortgage were entered into and executed 'on the instructions of' Mr Thompson and, therefore, 'on behalf of' Mr Thompson within the meaning of the section. They further submitted that, despite authority to the effect that an indirect benefit to a shareholder resulting from a payment or disposition in favour of the company is insufficient to attract the operation of s 588FDA,<sup>5</sup> in this case the benefit to Mr Thompson of Becon's forbearance to sue and, ultimately, the possibility that Becon might release him from all liability, were enough to conclude that the transaction was for his benefit and so to engage the operation of the section.

13           As against that, Becon embraced the Associate Judge's view that the section does not apply to a transaction simply because it is entered into on the instructions of a director. If it did, Becon said, the range of transactions to which it might conceivably apply would include almost any form of company transaction. The

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<sup>3</sup>       Reasons, 90-91.

<sup>4</sup>       Although that contention was not much pressed in argument, I do not take it to have been abandoned.

<sup>5</sup>       *Ziade Investments Pty Ltd v Welcome Homes Real Estate Pty Ltd & Anor* (2006) 57 ACSR 693 (Gzell J); *Re Great Wall Resources Pty Ltd (in liq)* [2013] NSWSC 354 (Brereton J).

better view is that, despite the definition of 'on behalf of' in s 9, a contrary intention appears in s 588FDA(1)(b)(iii). In that context, 'on behalf of' is used in a sense only of a direct benefit to the director. And, as Becon would have it, the likelihood of that being so is confirmed or at least supported by statements in the Explanatory Memorandum to the effect that the object of the section was 'to assist in the recovery of funds, assets and other property to companies in liquidation where the payments or transfers of property to directors are unreasonable' and thus to 'relate to transactions made to, on behalf of, or for the benefit of a director or close associate of a director'.

14 Becon also embraced the Associate Judge's conclusion that the fact that a transaction may be in the financial interest of a director is insufficient to bring it within the description of one 'for the benefit of' the director within the meaning of the section. Becon said that 'for the benefit of' necessitates something in the nature of an equitable interest or at least in the nature of an equity and Becon submitted that that view of the matter was confirmed or supported by Brereton J's conclusion in *Re Great Wall Resources Pty Ltd (in liq)*<sup>6</sup> that 'the idea of something being "for the benefit of" someone is well established in law, and involves the notion of the separation of the legal and beneficial interest'.

### *Analysis*

15 It was not disputed before the Associate Judge or before this court that the Mortgage was a disposition of property by Wulguru within the meaning of s 588FDA(1)(a)(ii) or that Wulguru's execution of the Deed resulted in the incurrence by Wulguru of an obligation to make such a disposition within the meaning of s 588FDA(1)(a)(iv). The only issue was and is whether the Deed and Mortgage were made on behalf of Mr Thompson within the meaning of the section, because they were executed on his instructions; or made for Mr Thompson's benefit within the meaning of the section because they had the effect of relieving him *pro tanto* of his

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<sup>6</sup> [2013] NSWSC 354.

obligations to Becon.

16           As at present advised, I think there may be force in Becon's contention that, in the context of s 588FDA(1)(b)(iii), the requirement that a disposition be made 'on behalf of' a director requires something more than that it be effected on the instructions of the director. Arguably, the provenance of the section and the objectives which (according to the Explanatory Memorandum) it was designed to achieve, imply that a disposition to a person 'on behalf of a director' connotes a disposition which is of some benefit to the director. At the same time, however, I doubt that Parliament intended to confine the operation of s 588FDA to direct benefits or that the section should be so construed.

17           In *Ziade Investments*, Jack and Jean Ziade were the sole shareholders of Welcome Homes Pty Ltd and Ritz Cinema Pty Ltd. In turn, they and Ziade Holdings Pty Ltd were the only shareholders of Jalnz Constructions Pty Ltd. While under their control, Jalnz executed mortgages in favour of Welcome Homes and Ritz Cinema. Gzell J doubted that the mortgages could be said to have been created on behalf of or for the benefit of Mr and Mrs Ziade within the meaning of the section. His Honour reasoned that:

... In my view, the companies as separate legal entities gained the benefit of the grants of the mortgages in their own right and not for the benefit of their shareholders.

I would not have thought that it was the intention of the legislature to include derivative interests constituted by value increases in shares of a company or trust benefited by the transaction. Had that been the intended result of the provision, one would expect the definition of a 'close associate of a director' to have been expanded.<sup>7</sup>

...

In my view, the benefit held by a third person that will bring a close associate of a director within the statutory provision must be a direct benefit and not a derivative benefit constituted by an increase in value of shares in a company or units in a trust.<sup>8</sup>

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<sup>7</sup>       *Ziade Investments Pty Ltd v Welcome Homes Real Estate Pty Ltd & Anor* (2006) 57 ACSR 693, 704 [86]–[87].

<sup>8</sup>       *Ibid* [89].

In *Re Great Wall Resources Pty Ltd (in liq)*<sup>9</sup> the facts were in some respects similar. At all relevant times, Mr Capocchiano was the sole director of and shareholder in Great Wall Resources Pty Ltd. At relevant times, he was also the sole director and shareholder of Comserve Pty Ltd. On 18 September 2006 Comserve completed the purchase in its name of real property at a price of \$850,000 funded to the extent of \$833,374 by payments made by Great Wall Resources, some of which were made before 15 September 2006 (being the four year relation-back date for the purposes of s 588FDA) but the majority of which, totalling the balance of \$426,449.56, were made after that date. The question was whether the payments made after the relation-back date were made for the benefit of Mr Capocchiano within the meaning of s 588FDA(1)(b)(iii). Brereton J held that they were not. Based on Gzell J's decision in *Ziade Investments*, his Honour reasoned that:

only a direct benefit will suffice and that a benefit to a company of which the director is a shareholder, even the sole shareholder, will not.<sup>10</sup>

...:

And that:

The idea of something being 'for the benefit of' someone is well established in law, and involves the notion of the separation of the legal and beneficial interest. A payment to a trustee upon trust is payment for the benefit of the beneficiary. But a payment to a company is a payment to a separate legal entity – the company – not a payment for the benefit of its shareholders.<sup>11</sup>

...

In my view, the well established distinction in a legal identity between a company and its shareholders means that a payment to a company is not a payment for the benefit of its shareholders. Accordingly, I do not accept that the payments to Comserve were payments for the benefit of Mr Capocchiano.<sup>12</sup>

19 Arguably, each of those decisions stands as authority that s 588 FDA is limited to direct benefits. But as against that, as counsel for the Liquidators submitted,

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<sup>9</sup> [2013] NSWSC 354.

<sup>10</sup> Ibid [40].

<sup>11</sup> Ibid [43].

<sup>12</sup> Ibid [46].

s 588FDA is self-evidently an anti-avoidance provision aimed at preventing errant directors from stripping benefits out of companies to their own advantage. It is to be presumed, therefore, that Parliament deployed the language of the section with the intention of achieving that objective. According to ordinary acceptance, 'benefit' includes both direct and indirect benefits and, prima facie, that accords with the apparent objective of the section. If so, why should the notion of benefit be confined to direct benefit for the purposes of the section?

20           Additionally, I accept the Liquidators' submission that, in this case, Mr Thompson did receive a direct benefit: in the form of Becon's covenant not to sue him and the possibility of his ultimate relief from his obligations as surety to Becon. That stands in contrast to the kinds of indirect shareholder benefits in issue in *Ziade Investments* and *Great Wall* and, to that extent, the observations of Gzell J and Brereton J in *Re Great Wall* and *Ziade Investments* are distinguishable.

21           Counsel for Becon argued that, be that as it may, the benefit received by Mr Thompson was nonetheless beyond the conception of benefit identified by Brereton J in *Re Great Wall Resources Pty Ltd (in liq)*: as one 'involv[ing] the notion of the separation of the legal and beneficial interest'. In counsel's submission, it requires that the disposition result in an equitable interest or at least something in the nature of an equity in the disposed property in favour of the director. And, therefore, said counsel, it excludes mere financial interests of the kind that were in issue in *Ziade Investments* and *Re Great Wall* and mere contractual rights of the kind derived by Mr Thompson.

22           I reject that argument for three reasons. First, if Becon's contention were correct, the words 'for the benefit of' in s 588FDA(1)(b)(iii) would add nothing to the preceding expression of 'on behalf of'. In that connection, I do not accept Becon's suggestion that 'on behalf of' is intended to capture cases in which the director in question derives an equitable interest in the disposed property and that 'for the benefit of' is directed at cases in which the director in question derives a mere equity in the disposed property (as where the disposition is in favour of a trustee of a

discretionary trust of which the director is an object). Although the objects of a discretionary trust may not have an interest as such in the assets of the trust, it is commonplace to refer to assets of that kind as being held on behalf of the objects of the trust, and there is no reason in the context of this legislation to suppose that Parliament would do otherwise.

23           Secondly, the natural and ordinary meaning of a requirement that something be for ‘for the benefit of’ a person is that it be ‘for the advantage, profit or good’ of the person.<sup>13</sup> So, in this context, just as moneys paid by A to B to discharge C’s indebtedness to B would ordinarily be conceived of as paid to B for the benefit of C, so too the incurrance by A of obligations to B in order *pro tanto* to relieve C of his obligations to B would naturally and ordinarily be conceived of as being for the benefit of C.

24           Thirdly, the natural and ordinary meaning of ‘for the benefit of’ accords to the objective of the section of preventing directors stripping benefits out of companies to their own advantage. Conversely, given the ease with which an errant director might channel benefits from a company under his charge to another company in which he is financially although not legally or equitably interested, there is every reason to suppose that Parliament intended not to confine the meaning of the expression to something in the nature of an equitable interest.

25           In *Re Great Wall Resources*, Brereton J said that one reason to prefer the more restricted meaning of ‘for the benefit of’ which his Honour favoured was that:

the use in s 588FDA of the concept of ‘a close associate’. ... As Gzell J observed in *Ziade*, if it had been intended to capture in s 588FDA payments to companies of which the director of the payer was a shareholder, one would have expected a wider definition of ‘close associate’.<sup>14</sup>

26           With respect, however, I disagree. As I see it, the close associate provisions are designed to catch a benefit flowing to a close associate whether or not the benefit

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<sup>13</sup> Oxford English Dictionary, meaning 3(b).

<sup>14</sup> [2013] NSWSC 354, [44].

has the effect of legally or financially advantaging the director in question. In contrast, the natural and ordinary meaning of 'for the benefit of' in s 588FDA is calculated to catch a benefit which legally or financially advantages the director in question regardless of whether it is paid or directed to a close associate of the director. Since the two regimes are aimed at different albeit potentially intersecting sets of possibilities, it would run counter to the evident intention of the legislation to read down either to the point of mutual exclusion.

27 Counsel for Becon contended that a further reason to read down 'for the benefit of' in the manner suggested by Brereton J was that, otherwise, any number of transactions attracting defences that prevent them being classed as voidable unfair preferences within the meaning of s 588FA, voidable uncommercial transactions within the meaning of s 588FB or voidable unfair loans within the meaning of s 588FD, would be at risk of being struck down as unreasonable director-related transactions to which no such defences apply. In those circumstances, counsel said, it ought be inferred that Parliament intended that such transactions be dealt with under the specific provisions relating unfair pretences, unfair loans and uncommercial transactions (and so with the benefit of the defences which apply under those provisions) rather than as unreasonable director related transactions (to which those defences do not apply). That intention was confirmed, counsel suggested, by the effect of s 588FG(2).

28 I do not think that contention to be persuasive. In my view, it is apparent from the terms of s 588FDA, and also from the Explanatory Memorandum, that the very point of the section was and is to catch director related transactions of kinds not otherwise liable to avoidance as unfair preferences, uncommercial transactions or unfair loans. In effect, that is the converse of a Parliamentary intention to confine the operation of s 588FDA to transactions of the kind with result in the director in question receiving an equitable interest or equity in relation to the disposed property. Contrary to counsel's submission, s 588FG(2) in effect confirms that is so by providing in substance that a court is not to avoid a voidable transaction to which

the defences apply unless the transaction is an unfair loan or an unreasonable director-related transaction. The point was also made in paragraph 3.15 of the Explanatory Memorandum, as follows:

The insolvency of the company at the time of an unreasonable director-related transaction is not a relevant consideration under the proposed amendments. Accordingly, section 588FG(2) is amended to remove unreasonable director-related transactions (along with unfair loans under section 588FD currently listed) from the scope of the exemption provided under that subsection in relation to knowledge of the company's solvency at the time the transaction was entered into.

29 Finally, on this aspect of the matter, counsel for Becon contended that, unless 'for the benefit of' were confined in the manner suggested by Brereton J, it would expose an extraordinarily broad range of potential transactions to the risk of avoidance as unreasonable director related transactions, and that it is apparent from the provenance of s 588FDA and what was said about it at the time of its introduction that such a broad sweeping effect was never the aim.

30 The answer to that, however, as counsel for the Liquidators submitted, is that s 588F(4) provides that, where a transaction is liable to avoidance solely because it is an unreasonable director-related transaction, the court is to make an order only for the purpose of recovering the difference between the value if any provided by the company and the value that it may be expected that a reasonable person in a company's circumstance would have provided having regard to the benefits and detriment to the company of entering into the transaction, the benefits and detriments to other parties to the transaction, and any other relevant matter. In effect, that confers a broad degree of discretion on the court to do what is just and equitable in the particular circumstances of each case and so thereby to avoid the possibility of capricious and unfair consequences for innocent third parties. That and the limited number of cases in which the unreasonable director-related provisions have featured since their introduction are a relatively sound indication that the potential application of this legislation is not nearly as broad as Becon says it fears.

31 In the result, I conclude that Wulguru's entry into the deed, its consequent incurrence of obligations to Becon and its execution of the Mortgage in favour of Becon in order *pro tanto* to relieve Mr Thompson of his obligations to Becon amounted to a conveyance, transfer or other disposition to Becon for the benefit of Mr Thompson within the meaning of s 588FDA(1)(b)(iii).

***Unreasonable director-related transaction***

32 The net effect of the transaction was to subject Wulguru to a liability (to which it was not previously subject) as surety for debts for which Mr Thompson alone was previously liable as surety, and to subject Wulguru's land, which was previously unencumbered by any such obligation, to a mortgage to secure those obligations without any corresponding or other direct or indirect advantage to Wulguru.

33 It was not suggested that a reasonable person in Wulguru's circumstances would enter into such a transaction in those circumstances and it cannot realistically be supposed that a reasonable person would enter into such a transaction in those circumstances.

34 It follows, as I see it, that the transaction is an unreasonable director-related transaction within the meaning of the section.

***Relief under s 588FE(2A)***

35 Section 588FE(2A) provides inter alia that an unreasonable director-related transaction of a company is a voidable transaction if entered into during the period of relation-back ending when the Court made the order that the company be wound up. Here, it is not in issue that the transaction was entered into during that period.

36 Under s 588FF, the court is empowered to make an order declaring such a transaction to have been void at and after the time when it was entered into, although, as I have said, whether or not the court should do so in a given case

depends on a range of considerations including in particular the interests of parties and third parties who might have acted in good faith with respect to the transaction.

37 In this case, it has not been suggested, and there is no evidence that, Becon so changed its position in reliance on the transaction that it would be unfair or unjust to avoid the transaction *ab initio*; and there is no suggestion that any third party would be prejudiced by an order avoiding the transaction *ab initio*. In effect, Becon accepted that, if this court held the transaction to have been an unreasonable director-related transaction, it would be appropriate to declare the transaction void *ab initio* and to make consequential orders for payment out to the Liquidators of the proceeds of sale of the mortgaged property. I am disposed to adopt that course.

### *Cross-appeal*

38 Finally, it is necessary to mention that there was also a cross-appeal against some of the orders as to costs made by the Associate Judge in favour of the Liquidators. That may be dealt with compendiously. Given the view which I take in the principal appeal, the cross-appeal becomes academic. If other members of the court agree that the transaction was an unreasonable director related transaction and ought be declared void *ab initio*, the appropriate order as to costs of the proceeding below is that Becon pay the Liquidators' costs of the proceeding.

### *Conclusion and orders*

39 For the reasons I have given, I would allow the appeal and set aside the judgment and orders below. In lieu thereof, I would give judgment for the Liquidators and order that the Deed and Mortgage be declared void *ab initio*, that the proceeds of sale be paid out to the Liquidators and that Becon pay the Liquidators' costs of the proceeding below. It should further be ordered that the cross-appeal is dismissed and that Becon pay the Liquidators' costs of the cross-appeal.

BEACH JA:

40 I agree.

McMILLAN AJA:

41 I agree with Nettle JA.

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