



GREENWAY CHAMBERS

# Pleading insolvent trading claims: does the liquidator need to know the value and details of creditor claims before commencing?

---

Presented by Dinesh Ratnam and Sam Sykes

## To Plead or Not to Plead?

---

- *Devine v Liu; Devine v Ho* [2018] NSWSC 1453, per Parker J
- *Copeland in his capacity as liquidator of Skyworkers Pty Limited (in Liquidation) v Murace* [2023] FCA 14, per Halley J



## Statutory Framework – Insolvent Trading Claims

Section 588G - Director's duty to prevent insolvent trading by company.



### Key Features of section 588G

- There exists a debt owing to the company
- The incurring of the debt occurred when the person was a director
- The company was insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt
- At that time of incurring the debt, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent



## Key Features of section 588G

The contravention:

By failing to prevent the company from incurring the debt, the [person](#) contravenes this section if:

- the [person](#) is aware at that time that there are such grounds for so suspecting; or
- a reasonable [person](#) in a like position in a company in the company's circumstances would be so aware.



## Section 588M - Recovery of compensation for loss resulting from insolvent trading



### Liquidators right of recovery - section 588M

- a debt has been incurred by the company
- the time the debt was incurred, the company was insolvent
- the creditor has incurred loss or damage “in relation to” the incurring of the debt
- the director contravened s588G (2) or (3)



### 588G & 588M

- Date debts incurred
- When the debts were incurred and when they fell due for payment
- Formation of the debt - Contract?
- Who are the creditors
- Solvency of the company - when it became insolvent
- When can a suspicion be drawn that the company was insolvent or would become solvent





### Background procedural issues in *Devine* leading to the applications heard before Parker J

- By Summons, the Liquidator commenced proceedings in October 2017
- The Defendants agitated pleadings; SOC filed in 2018
- Separate proceedings commenced in the Local Court - s 588FE Voidable Transactions; s 588FA Unfair Preferences & s 588FB Uncommercial Transactions)
- Particulars sought of the Liquidators claim in the Supreme Court
- By the time the applications where filed, there existed pleadings and evidence on the Liquidators substantive case
- Liquidator sought to amend its case
- Security for Costs agitated



### The Applications before Parker J (Devine)

- Liquidator's application to amend
- First Defendant's application to strike out and dismiss proceedings
- Fourth Defendant's application to transfer proceedings
- First & Fourth Defendants application for Security for Costs



# CORPORATIONS ACT 2001

---

## Liquidator's Evidence

Secured Creditor	One claim for \$901,506
Employee (priority)	A claim from the Commission of Taxation for unpaid superannuation guarantee levy obligations of \$141,571 together with thirty five individual claims from employees totalling \$164,507
Employee (related party)	Three claims totalling \$188,755
Ordinary unsecured  Creditor	Twenty five claims totalling \$2,139,685



### Ordinary Unsecured Creditors

- Standard Constructions Pty Ltd - \$1,877,268 (\$987,250 liquidated damages)
- General Supply of Goods or Services - \$130,000 (power and gas)
- Employee claims - wages, annual leave, preferred employee claims & agreement to pay



### Ordinary Unsecured Creditors

*“It is unclear from the proofs whether the employees in question were claiming that the amounts allegedly due represented amounts which had not been paid at all or whether they were claiming they had been paid less than their legal entitlement for work done.”*

*“There was no evidence to explain this. What is clear is that no statements were provided to verify that the employees had in fact worked, and had not been paid or paid in full, for the periods referred to. Nor was there any evidence of any relevant records of the Company which would support the claims.”*



### Ordinary Unsecured Creditors

*“There was nothing to indicate how these documents fitted together nor was there any submission on the subject from counsel for Mr Devine.”*



## The offending plea

---

30 The proposed Amended Statement of Claim pleads:

9. Between 28 June 2011 ~~4 November 2013~~ and 16 October 2014 (**Relevant Period**), the Company incurred debts to unsecured creditors in the sum of

\$1,643,390.00 which remain outstanding (**Debts**).

### **Particulars**

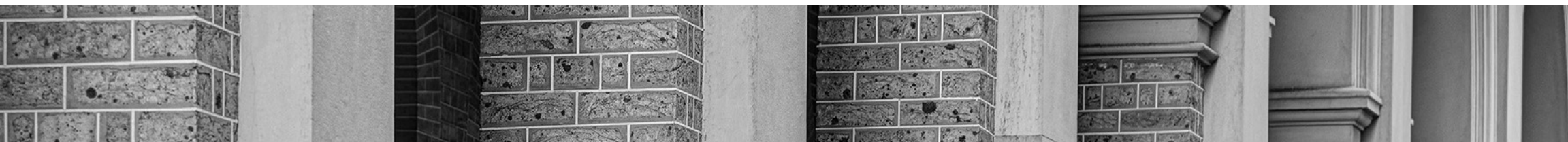
- (i) Schedule 2 contains a table listing the unsecured creditor claims as at 16 October 2014.
- (ii) The plaintiffs rely on the proofs of debt submitted by creditors of the Company which are exhibited at pages 739 to 1051 of Exhibit TD-1 to the affidavit of Trent Andrew Devine sworn 3 October 2017.
- (iii) Schedule 3 contains a table listing the unsecured creditor claims as at 16 October 2014 with respect to Debts that were incurred on or after 16 September 2013.



## The Liquidator on the defence

---

*“Counsel for Mr Liu argued that this form of pleading is inadequate to specify the relevant debts or (crucially) when such debts were incurred. In response, counsel for Mr Devine acknowledged a lack of detail but characterised it as a matter of detail which could be filled in later as the proceedings continued and further relevant documents came to light. Counsel referred to the possibility of issuing subpoenas.”*





Mr Liquidator, the rules apply to you, just as they do for everyone else

---

*“The Court is always sympathetic to the difficulties liquidators may have in trying to recover monies on behalf of creditors against recalcitrant or dishonest former officers of companies in liquidation. But when proceedings are brought by a liquidator on behalf of the company, the rules are the same as they are for any other litigant. It does not matter whether Mr Devine considers he is acting responsibly or not. The only question is whether Mr Devine’s pleadings comply with the Court’s rules.”*



## Key Findings in *Devine*

---

*“Furthermore, counsel for Mr Liu is plainly correct in submitting that the failure to plead when the debts were incurred is a fundamental flaw. The date on which the debt is incurred is an essential aspect of the claim. Unless that date is known, it is impossible to evaluate whether the Company was insolvent or whether the elements of contravention in s 588G are made out.”*

*“The question of when a debt is incurred may be a complex and contestable one. It is in my view essential that the Statement of Claim plead not only when it was that each debt was allegedly incurred but also how it was that the debt was incurred. The relevant contractual terms and the facts which give rise to the relevant debt should be pleaded so that they can be admitted or issue can be joined.”*



## Key Findings in *Devine*

---

*“On the other hand, in my view it will be necessary to plead the incurring of the alleged debt(s) to Standard claim in some detail. This will include pleading the relevant clauses of the contract and the facts which give rise to the various different components of the claims, such as the undertaking of the building work. But that is no hardship. The amount being claimed is over \$890,000. I do not see why Mr Devine should expect to plead a claim for this amount in less detail than would be required than if Standard were suing the Company on the contract.”*



## Key Findings in *Devine*

---

*“In my view both the current version of the Statement of Claim and the Amended Statement of Claim are plainly inadequate in this regard. The deficiencies are matters of pleading not merely of particulars.”*



### Allegation of Insolvency

- S 286 (presumption)
- S 95 (actual)



## Particulars sought of the insolvency allegation

---

9. Please identify each financial record which it is alleged the Company failed to keep and/or retain.
10. In respect of each financial record in answer to 2 above, please identify the basis upon which it is alleged that the Company failed to keep and/or retain that record.



## The Response

---

2. Our clients allege that the second plaintiff failed to keep and/or retain the following financial records for the period 28 June 2011 to 16 October 2014:

- Cheque payment stubs; Purchase orders;
- Sales journal;
- Tax return information; Cashbooks;
- Profit and loss trading statements; Balance sheets;
- Cash payment records;
- Supplier invoices. Mr Devine has received approximately 21 supplier invoices; Debtors' ledgers;
- Other financial statements; Bank deposit slips; Purchase journals;
- Any deeds or documents; Plant register;
- Creditors' ledgers. Mr Devine has received partial creditor records for 13 August 2013 to 28 February 2014;
- Stock records;
- Asset register; and/or
- Documentation pertaining to any litigation or pending or potential litigation.



## Parker J's view

---

- Allegation of actual insolvency is a matter for evidence.
- Presumed insolvency is not made out simply because the company failed to maintain records





## Parker J's view

---

*“There are at least five possibilities. The Company may have failed to keep financial records which (a) correctly recorded and explained its transactions over the period; or (b) correctly recorded and explained its financial position over the period; or (c) correctly recorded and explained its financial performance over the period; or (d) would enable true and fair financial statements for the period to be prepared; or (e) would enable such statements to be audited.”*



## Parker J's view

---

*“In my view, proper particulars of the presumed insolvency allegation would require the identification of which of these alternatives are relied upon; and, for each alternative, the particular records whose absence is relied upon to sustain the allegation. The particulars so far provided are nothing more than a list of allegedly missing records which might or might not relate to one or other of these alternatives. Some other categories (for example, “documentation pertaining to any litigation or pending potential litigation”) are completely obscure. In other cases, it is clear that Mr Devine has some records, but what is missing is not specified. Given that Mr Devine has the “banking records”, it is not clear how other categories of records (for example, “cheque payment stubs”) makes any difference. In my view the particulars are clearly inadequate.”*



## Parker J's view

---

*“But I do think that the complaints of the state of the insolvent trading case have force. Many of the debt claims are clearly unsustainable on the material currently before the Court. Counsel for Mr Devine accepted that the proofs of debt are not business records. Accordingly, the proofs of debt themselves do not prove that the employees are owed the monies they claim. If there are no available payroll records then the only way in which those claims can be proved would be by evidence from the employees themselves. Counsel eventually conceded that for those debt claims to be pursued in the insolvent trading case would require further lay evidence and accordingly that, contrary to the Court’s direction, Mr Devine’s lay evidence is incomplete.”*



## Parker J's view

---

*“Likewise it is clear that the material provided in support of Standard’s debt claim falls far short of what is necessary to prove the claim. It is absurd to think that such a claim could succeed without proving the terms of the contract itself. Of course it may be possible for Mr Devine later to subpoena the contract but if he does not have it now how does he even know that the claim is justified?”*



## Parker J's view

---

*“In my view a liquidator should not use an insolvent trading action to dump a set of inadequate proofs of debt on a defendant for the defendant to work out which of the debts are valid and when they were incurred. Judgment should be exercised before claims are made against defendants for compensation for losses suffered by alleged creditors, rather than afterwards. Claims which are try-ons should be weeded out and if creditors are not prepared to provide the information necessary to justify the claim, then those claims should fall by the way-side.”*



## So, what happened?

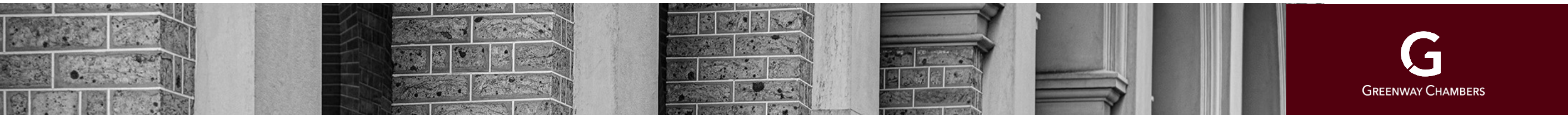
---

- Statement of Claim struck out
- Application for leave to amend on the proposed claim dismissed
- Liquidator allowed to reformulate with a fresh pleading



## Matters for Determination

1. The matters raised by his Honour were at [6]:
  - (a) is it necessary, pursuant to s 588G of the Corporations Act, to plead the date on which a debt relied upon is alleged to have been incurred and how the debt was created;
  - (b) have the plaintiffs provided proper particulars of the presumed insolvency claim;
  - (c) have the plaintiffs provided adequate particulars of the actual insolvency claim;
  - (d) in all the circumstances, should the proceedings be summarily dismissed or should the statement of claim be struck out; and
  - (e) what conditions, if any, should be imposed on any grant of leave to file an amended statement of claim.



### The Date of Debts

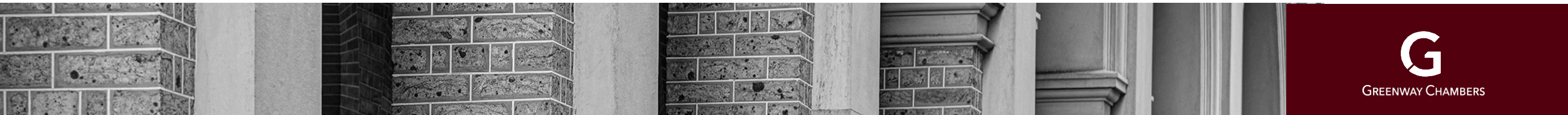
1. Halley J followed Parker J's decision in *Devine* and ruled that it is necessary for a liquidator to plead the date of the debts.
2. Although the date may not matter to a liquidator if they can demonstrate insolvency throughout the entire period, it was held to be relevant to the defences available to a director.
3. Halley J found at [20] that the liquidator's position is "understandable" but it is insufficient to identify only the creditor and the amount of the debt.





## Presumption of Insolvency: Books and Records

1. Halley J accepted Parker J's reasoning that it must show:
  - a. correctly recorded and explained its transactions over the period, or
  - b. correctly recorded and explained its financial position over the period, or
  - c. correctly recorded and explained its financial performance over the period, or
  - d. would enable true and fair financial statements for the period to be prepared, or
  - e. would enable such statements to be audited.
2. See Halley J at [30] - [31]



### Pleading Actual Insolvency

1. Halley J rejected the director's contentions that the pleadings of actual insolvency were merely "boilerplate" particulars.
2. Actual insolvency a matter for evidence.
3. However, relied on the dates of the debts for those matters to be made good.



# Skyworkers

---

## Where to from here?

1. Distinguishing *Devine* and *Skyworkers*
2. Were Halley J and Parker J wrong?

