PREFERENCES - RUNNING ACCOUNTS

SEK HULME QC

Barrister, Victoria

I want to make a few comments on two or three of the cases which have been mentioned. Firstly as to the running accounts and the question of preferences. Terry raises initially the question "Have you received an advantage?". Sometimes one has the position that in times of stress money is paid into an overdrawn account as part of a larger transaction whereby the customer says to the bank "If I put in this $1,000, can I write a cheque and pay that chap $1,000?" The bank says yes, he puts the $1,000 into the bank, reducing the overdraft momentarily. But immediately the $1,000 goes out again, and the bank is back where it started. I am not concerned with whether or not the outside creditor has got a preference - that is a different matter. But has the bank received a preference?

It has been held - this is Richardson's case - that where money comes in as part of a total transaction whereby that money is to go out again the liquidator cannot stop the clock as the cheque comes into the bank and say that there is a preference which he can recover from the bank. If there is a single integral transaction you must judge the preference across the whole transaction and not across portion of it.

In Queensland Bacon the High Court took that further. When I say the High Court, I mean the Chief Justice, Sir Garfield Barwick. There was a court of three. Mr Justice Menzies dissented on this issue, and Mr Justice Kitto sadly found it unnecessary to deal with it, as he decided the case on the facts. I say sadly because it would have been illuminating to have his view on the matter.

The accounts concerned in Queensland Bacon were running accounts of a man owning a chain of grocery shops in Queensland. He had running accounts with various suppliers. He had expanded very quickly, beyond his immediately available capital. Everybody knew that he was not too liquid. Everybody believed he was running a very prosperous chain of grocery shops and that better times would come. Everybody was held to be acting in good faith - I say everybody; all the creditors. The Chief Justice said that if implicit in the circumstance in which the payment is made is a mutual assumption by the parties - no requirement of an

express agreement, you will notice - a mutual assumption that there will be a continuance of the relationship of buyer and seller, with resulting continuance of the relationship of debtor and creditor, you do not determine the question of preference by stopping the clock half-way through. You look at the overall series of transactions - the debits and the credits - and find at the end of the day the net effect. If over the course of trading you have brought down an overdraft from $12,000 to $7,000 that may be a preference of $5,000. But there has not been a preference for what may be the much greater total of the sums of money deposited in the series of transactions by which debits have been created.

It is not very clear why Mr Justice Menzies rejected that and one need not take time here to look at it.

That doctrine seems to be in good heart. It is assumed in Kiara Nominees (which I will turn to next, and where I think that on the judge's findings the Full Court got the figures wrong). The other point arising out of Queensland Bacon ran in favour of banks and creditors. That is that it was not enough to have what Mr Justice Kitto called a mere idle wondering whether insolvency exists or not. It is not enough to suspect that someone might be insolvent. What you must suspect or have reason to suspect is that he is insolvent. I think it is fair to say that in the 20 years since then a number of creditors - in particular banks - have escaped through those words of Mr Justice Kitto in circumstances where previously their suspicion would have been held to be sufficient. There has to be, said Mr Justice Kitto, something which would create for a reasonable person an actual apprehension or fear that the situation of the payer is in actual fact that of insolvency.

Can I turn to Kiara Nominees next. Let me express a personal interest in it. It has been said that application was made to the High Court for special leave to appeal. Yes it was, and the application was lost. I lost it. (I add that I had not appeared in the matter down below.) It was one of those sad cases where it is quite clear that the Court thinks that potentially this was an appealable point. Let me explain that. Appeals to the High Court these days lie solely by way of special leave. No litigant is entitled to say "I should have special leave because it is fair to me, and the court below was wrong". Whether you have come up through the State or the Federal structure of courts, you have been to a judge and you have had a right of appeal to an appeal court. You have had your day in court and your week in the appeal. The High Court is there not to seek justice to the litigant. It is there to keep control of the development of the law. If there is a point of law which in the public interest ought to be determined by the High Court, then special leave is given. So what to you is your very personal case is to the High Court a good or a bad vehicle for the determination of a point of law.

Some cases raise points of law in very clear fashion. There it is, and if the High Court deals with it that will be the end of the litigation. Kiara Nominees was a mixed up jumbled case, a very bad vehicle for an appeal to the High Court. The Chief Justice went out of his way, in rejecting special leave, to say that statements which had been made by the High Court in the earlier case of Taylor v. White might well some day demand consideration by the court. But this was not a suitable case for doing it.

Those carefully guarded words are High Court language saying that Taylor v. White does not look too good. But obviously they had not heard much argument on the matter and it is hard to go further than that. It is more or less an invitation to anyone who in future loses a case on the authority of Taylor v. White; an indication that there might be a good chance of getting special leave - so long as the case is a good vehicle for such an appeal.

I say it was a jumbled up kind of case. That was because different members of the Full Court in Western Australia took different views on the facts. His Honour the Chief Justice found that the bank manager did have reason to suspect. The trial judge had said that he did not suspect and that he had no reason to suspect. The Chief Justice indicated a suspicion that he did suspect, but ultimately accepted that he did not. But he found that the manager had reason to suspect. The other members of the Court dealt with the matter on the issue of the ordinary course of business, without going into that area. And as you have been told, they decided that it was not in the ordinary course of business because the debtor intended to prefer the bank in the short term, and indirectly themselves as guarantors. They were not preferring out of kindness and that was enough.

Now it is that point which comes less than clearly from Taylor v. White. It is another one of those difficult cases. Sir Owen Dixon decided the case on the facts and did not have to deal with the relevant point. Mr Justice Kitto dissented on the relevant point. There were some statements of the other three judges, Mr Justice Taylor, Mr Justice Windeyer and Mr Justice Williams I think, which are not very sensible. One in particular, and it is almost at the heart of Mr Justice Taylor's reasoning. He says that in England they have the concept of the fraudulent preference. That is to do with intention of the creditor to prefer the debtor. Here in Australia we have a stricter doctrine, that of the fact of preference. You do not have to show an intention; you look at the fact at preference. And he says that it would be surprising if a payment which would constitute a fraudulent preference under the English Bankruptcy law might escape s.95 (as the relevant section then was), in what was supposed to be a stricter scheme.

It is a false argument. The English law has a net which catches certain transactions. Australian law has a net which is

differently drawn. Accept that it is more tightly drawn. But we then allow a series of escapes from it. And if someone goes out through one of those Australian escapes there is nothing surprising that he would have stayed in the English net which had a broader initial mesh but no such escape. Say that from a crowd of people English law would bring into the room all people over six feet, and Australian law would bring into the room all people over five feet six. Australian law would certainly bring in more people. But if Australian law has special provision letting all Presbyterians go out again, then you may easily find that at the end someone who is six feet six would be inside the English net but outside the Australian one. There is nothing curious about that result, if that is your system. If your system of escape is not related to the size of the person then you will finish with some big people outside the small mesh net, while still inside the broad mesh net. That was the logic of what was said by Mr Justice Taylor.

I said that the court seemed to have the figures wrong at some point. The trial judge had said that when the final payment was made there was no mutual assumption of continuance of the relationship. The bank would have assumed there was going to be continuity, but that assumption was not shared by the debtor. Now if that approach be right, you have to stop the Queensland Bacon kind of approach before that transaction. You would not treat that transaction as part of the rolling scheme, because the rolling scheme had stopped just before that transaction.

That was one more of the difficulties to which Kiara Nominees gave rise on its own facts. It meant that the High Court could not have given final judgment. It would have had to remit the case back again. And they really do not like cases bouncing up and down the legal system in that way.

It is clear that there is a good deal of thinking still to take place as to the fitting together of these various doctrines, in particular the Queensland Bacon doctrine of the running account and what has been said in Kiara Nominees. It does illustrate certain difficulties in the running account rules themselves.

The last case that I wanted to mention was Geraghty's case, the South Australian case where the liquidator went directly against the director who had relieved himself of liability. There are some words in the judgment of the Chief Justice which might be thought to indicate some mild surprise that the unfair liquidator had pursued the director rather than the bank. I doubt if they are meant to indicate that. They are uttered in context where the liquidator is saying that he would like an order for the money and please can he have the interest. And it is in that context of interest that the Chief Justice refers to a surprising mathematical consequence of what had happened.

Assume that the liquidator had called on the bank to restore $10,000. The bank puts back the $10,000. The bank then looks at

the director under the guarantee and asks for the $10,000. The director pays. He is then subrogated to the rights of the bank. He proves in the liquidation and gets back say $5,000 - they are paying 50 cents in the dollar. So that the final cost to the director is the extent of the extra benefit that the bank got - the extra $5,000 that it would not have got in a liquidation.

Done the way it was in fact done, you look at the payment to the bank of $10,000. The liquidator got an order for payment of that amount of money by the director. End of story. The director has no right to come into the liquidation for that $10,000. He has no right to look to the bank for the $10,000. And it is that point that the Chief Justice says, look life is fairly hard for this director; the liquidator has already gone against him and that has cost him several thousand dollars. I am not going to give you interest on top. That extra money would go to the benefit of the ordinary unsecured creditors. It does not help the bank, it comes out of the pocket of the director and goes in to swell the pool for the unsecured creditors.

All of these cases show plenty of scope for difficulties for bankers earnings for lawyers.