PREFERENTIAL PAYMENTS

QUEENSLAND BACON PROPRIETARY LIMITED v. *REES*
THE EGG MARKETING BOARD v. *REES*
BURNS PHILP AND COMPANY LIMITED v. *REES*
FOLEY BROTHERS PTY. LIMITED v. *REES*[1]

The operation of s. 95 of the Bankruptcy Act 1924-1960 in avoiding preferential transactions entered into prior to the bankruptcy of an individual or the liquidation of a company[2] has become a matter of almost perennial concern before the High Court of Australia.[3] These four cases are rather unusual in that all involved appeals by creditors of the same company, Hennessy's Self Service Stores Pty. Ltd. (in liquidation). The liquidator of that company sought to recover as preferences, certain payments made to each of the appellants within the period of six months immediately preceding the commencement of the winding up of the company.[4]

The questions dealt with in these cases will be of continuing importance notwithstanding the repeal of the Bankruptcy Act 1924-1960 by the Bankruptcy Act 1966.[5] Section 122 of the new Act, which provides for the avoidance of preferences, is, in all material respects, in substantially the same terms as s. 95 of the old Act.

By virtue of the common origin of the dispute in these cases, and the similarity of the legal principles involved, they have been dealt with by the court together. This note will be concerned principally with the facts of the Queensland Bacon Pty. Ltd. appeal and the general principles which were considered in all four appeals. For convenience the cases collectively will hereinafter be referred to as the *Queensland Bacon Case*.

In the *Queensland Bacon Case* the High Court had occasion to examine many of the problems which arise in the interpretation of s. 95. Doubtless the case will rank as the leading Australian authority on the subject of preferences which is potentially a contentious issue in most, if not all, cases of insolvent debtors. It is unfortunate that in an area so important in the affairs of businessmen the task of extracting principles from the case is made more difficult by the fact that the judges have adopted differing approaches to the legal problems raised by the facts.

The Facts and Decision

Hennessy's Self Service Stores Pty. Limited (the company) was duly incorporated in 1959 under the Companies Acts 1931-1960 (Qld.) and commenced to conduct a chain of self-service stores which had previously been

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[1] (1966) 40 A.L.J.R. 13.

[2] The Companies Act 1931-1960 (Qld.) in common with the uniform Companies Acts of the various states and the Companies Ordinance of the Australian Capital Territory incorporates by reference those provisions of bankruptcy law which have the effect of rendering transactions void or voidable. Section 293 (1) of the uniform Companies Acts provides "Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner."

[3] See also *Rees* v. *Bank of New South Wales* (1964) 111 C.L.R. 210; *Sandell* v. *Porter* (1966) 40 A.L.J.R. 71.

[4] For an earlier case also involving this company see *Rees* v. *Bank of New South Wales* (1964) 111 C.L.R. 210.

[5] Act No. 33 of 1966; s.122.

conducted by John Joseph Hennessy, the governing director of the Company. Within the two years following its incorporation, the business of the company expanded rapidly and out of all proportion to the company's capital. Expansion was financed by means of bank overdraft and credit allowed on purchases from a wide range of wholesalers. As a result of the introduction in November, 1960, of general restrictions on bank credit, the company was required by its bank to substantially reduce its overdraft. This occurred at a time when the company held excessive stocks of foodstuffs, and so despite its financial difficulties the company continued its expansion programme. Eventually a petition was presented on the 10th February, 1961 and a winding up order was made on 16th March, 1961. The deficiency of assets was such that the anticipated dividend to unsecured creditors was estimated to be approximately 2/- in the pound.

The liquidator applied to the Queensland Supreme Court to recover as preferences a series of payments which had been made to each of four of the company's creditors. These payments had been made at a time when many of the cheques issued by the company in payment of accounts generally were dishonoured on presentation. Answers such as "no arrangements", "arrangements incomplete", or "present again" were given by the bank on these cheques, but at the time of presentation of the petition, no cheque which had been issued more than three months previously, remained dishonoured.

Gibbs, J. at first instance found that actual insolvency existed from 1st November, 1960. The evidence before him, although sufficient to cause him to suspect earlier insolvency, was not sufficient to justify a positive finding to that effect. In particular he was not convinced that such a finding would be justified merely because prior to 1st November, 1960 the company had pursued a continuous course of conduct in issuing post-dated cheques nor by the fact that before that date, many of its cheques had been dishonoured with answers such as "no arrangements", "arrangements incomplete" or "present again". All cheques dishonoured before 19th November, 1960 had, by the date of presentation of the petition, either been paid or replaced by others which were duly met. The finding as to the date of insolvency seems to have depended upon an examination of the cheques issued in November and all parties to the appeals were prepared to accept that finding.[6] His Honour held that certain payments made since the time of actual insolvency constituted *de facto* preferences. Although the payments had been made in the ordinary course of business and for valuable consideration, the payees were not, he decided, entitled to be regarded as payees in good faith within the meaning of s. 95(4) of the old Bankruptcy Act. Consequently they were not entitled to the protection of s. 95(2)(b). The payments were therefore declared void and set aside. Faced with the prospect of repayment, each of the four creditors appealed to the High Court of Australia.[7]

By majority[8] the High Court reached the conclusion that, save as to one payment made to the Egg Marketing Board, all of the payments were protected by the provisions of s. 95(2).

The Principles Relating to Preferential Payments

As mentioned above, statement of the principles emerging is not a simple matter, because each of the Judges of the High Court approached the problems inherent in s. 95 in a different manner.

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[6] See *per* Barwick, C.J. 40 A.L.J.R. at 15.

[7] The summary of the facts is extracted principally from the judgment of Barwick, C.J.; 40 A.L.J.R. at 14-15.

[8] Barwick, C.J., Kitto, J. (Menzies, J. in dissent).

The transaction involved

Section 95(1) strikes, *inter alia* at "payments made . . .". The liquidator limited his claims to payments made to creditors by cheque. Each of the cheques was duly presented and subsequently honoured, and there was no direct discussion in the case as to what aspect of the transaction constituted the payment. However it seems to have been assumed by the High Court that the transaction was constituted by payment of the cheque[9] by the bank rather than the mere delivery of the cheque by the debtor and this would seem to be the preferable view.[10]

The test of insolvency

There has been much controversy and judicial comment in connection with the statutory definition of insolvency; defined in s. 95(1) of the Bankruptcy Act as that state of affairs when a person is ". . . unable to pay his debts as they become due from his own money. . . ."

Barwick, C.J. considered the circumstances in which that definition ought to be satisfied in the two recent cases of *Rees* v. *The Bank of New South Wales*[11] and *Sandell* v. *Porter*.[12]

In *Rees* v. *The Bank of New South Wales* His Honour stated:

> It is quite true that a trader, to remain solvent, does not need to have ready cash by him to cover his commitments as they fall for payment, and that in determining whether he can pay his debts as they become due, regard must be had to his realisable assets. The extent to which their existence will prevent a conclusion of insolvency will depend on a number of surrounding circumstances, one of which must be the nature of the assets and in the case of a trader, the nature of his business.[13]

In the case of *Sandell* v. *Porter*[14] His Honour again considered the definition of insolvency:

> Insolvency is expressed in Section 95 as an inability to pay debts as they fall due out of the debtor's own money. But the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realisation by sale or by mortgage or pledge of his assets within a relatively short time—relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilising such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency. Whether that state of his affairs has arrived is a question for the Court and not one as to which expert evidence may be given in terms though no doubt experts may speak as to the likelihood of any of the debtor's assets or capacities yielding ready cash in sufficient time to meet the debts as they fall due.[15]

The following points can be drawn from this statement of the law relating to insolvency:

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[9] See for example, the judgment of Kitto, J. 40 A.L.J.R. at 25.

[10] This view is supported by the English decision of *In re Hone* (1951) Ch. 85.

[11] (1964) 111 C.L.R. 210.

[12] (1966) 40 A.L.J.R. 71.

[13] (1964) 111 C.L.R. 210 at 218. The views adopted by Barwick, C.J. had been expressed as early as 1907 in the case of *Bank of Australasia* v. *Hall* (1907) 4 C.L.R. 1514 *per* Isaacs, J. at 1543.

[14] (1966) 40 A.L.J.R. 71.

[15] 40 A.L.J.R. at 73.

(1) Notwithstanding a lack of ready cash, a debtor is not insolvent if he has assets sufficiently quickly realizable to meet his debts as they fall due.[16]
(2) Whether the debtor's assets are sufficiently quickly realizable depends upon:

(i) The nature of the debtor's resources, particularly from the point of view of liquidity.
(ii) The nature and amount of his debts.
(iii) The business of the debtor.

(3) It is the task of the Courts to determine the existence of actual insolvency, and this is the basis upon which the determination of the existence of a preference rests. Barwick, C.J. in the *Queensland Bacon Case* says "the whole structure of Section 95 is built around the fact of actual insolvency. It is only a payment made by an insolvent debtor which comes within the section. . . ."[17] This is not a matter of expert evidence, although expert evidence may be adduced to determine the nature and availability of the debtor's assets. In the *Queensland Bacon Case* the High Court accepted the findings of the Judge at first instance as to when the company was in fact unable to pay its debts as they became due from its own money within the meaning of s. 95(1) of the Bankruptcy Act. Barwick, C.J. indicated that such a finding was reached as a result of a careful review of ". . . all the facts and circumstances up till the time of the liquidation of the company. . . ."[18] It is evident from the findings of both Gibbs, J. at first instance and the High Court that such an enquiry must be both extensive and thorough. Facts evidencing a mere temporary lack of liquidity will not be sufficient to lead to an inference of insolvency.

What constitutes a Preference in a "running account" situation?

Barwick, C.J. stated that ". . . it is the . . . effect in fact . . ."[19] of the transaction that determines whether a preference is given to a particular creditor. It was established in *Burns* v. *Stapleton*[20] that a payment by a debtor, to constitute a preference, must involve a depletion of the debtor's assets. It would appear to follow that a creditor who supplied goods and contemporaneously received payment for those goods from the debtor, could not be said to have received a preference.

The position is complicated where creditor and debtor transact in a "running account" situation. No one payment can be connected to the supply of a particular parcel of goods but nonetheless, if the creditor continues to supply those goods, it may be argued that he is not causing an overall depletion of the debtor's assets. This line of reasoning was adopted by Barwick, C.J.:

> In general, to pay one of a number of creditors, and neither paying, securing nor arranging with the others is to prefer the creditor who is paid. But it seems to me that it is one thing to pay a sum of money in the liquidation of an indebtedness, so as to end the relationship of debtor

[16] It is interesting to note that the words ". . . from his own money . . ." are deleted from the provisions of s.95(4) of the Bankruptcy Act. It seems clear that those words in s.95(1) do not preclude the possibility of the debtor being able to borrow money, at any rate on the strength of his own assets. It would appear that s.95(4) envisages a wider scope of potential assistance available to the debtor. It would appear that the creditor would be entitled to entertain the possibility that a friend or relative of the debtor would be prepared to advance an unsecured loan or make a gift.

[17] 40 A.L.J.R. at 20.

[18] *Id.* at 15.

[19] Citing *Downs Distributing Co. Pty. Ltd.* v. *Associated Blue Star Stores Pty. Ltd.* (in liquidation) (1948) 76 C.L.R. 463 see 40 A.L.J.R. at 16.

[20] (1959) 102 C.L.R. 97. At page 104 the High Court stated "Section 95 avoids not instruments but certain kinds of changes in the legal situation of the person unable to pay his debts. What the sub-section clearly intends to make void, where it applies, is the change which, if allowed to be effectual, would dislocate the statutory order of priorities amongst creditors."

> and creditor and, that it may be quite another to make a payment on account of a "running" indebtedness, the payment not in any wise intended or understood to end the relationship of the debtor and creditor, but rather to ensure its continuance.[21]

In the *Queensland Bacon Case* it was argued at first instance by Foley Bros. Pty. Ltd. that the existence of a preference should be determined, in a "running account" situation, by considering the difference between the balance of the account immediately prior to the disputed payment and the balance at the commencement of winding up. This contention was based on the findings in *Richardson* v. *The C.B.C. of Sydney*,[22] but was rejected by Gibbs, J. who distinguished that case from the present on the facts. The finding of no preference in *Richardson's Case* was based on an express agreement between the parties that the bank would allow an overdraft arrangement to continue so long as certain payments were made. In the present case the payments to the creditor were not to ensure future supplies of goods but to reduce an existing debt. Gibbs, J. concluded that such payments could only be considered as not conferring a preference if they were made on the basis of some express arrangement between the parties concerned with the continuing supply of goods to the debtor company.

Barwick, C.J. considered that the principle enunciated in *Richardson's Case* could be extended beyond the situation where an express arrangement for the continued supply of goods existed. He concluded:

> In my opinion, it is enough if, on the facts of any case the Court can feel confident that implicit in the circumstances in which the payment is made is a mutual assumption by the parties that there will be a continuance of the relationship of buyer and seller with resultant continuance of the relation of debtor and creditor in the running account, so that, to use the expressions employed in *Richardson's Case (supra)*, "it is impossible"—I interpolate, in a business sense—"to pause at any payment in the account and treat it as having produced an immediate effect to be considered independently of what followed. . . ."[23]

The question of the existence of a preference, His Honour considered, was ". . . not to be determined payment by payment but . . . by the fate of the running account between the date of the first of the payments . . . and the date of the liquidation".[24] It would appear that His Honour's conclusions, whether in the situation of an express agreement between creditor and debtor or in the situation where such an agreement is implied, only serve to affirm the principle enunciated in *Burns* v. *Stapleton* that a preference only exists

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[21] 40 A.L.J.R. at 16. The "running account" situation was also considered in the cases of *Richardson* v. *The Commercial Banking Co. of Sydney* (1952) 85 C.L.R. 110 and *Rees* v. *The Bank of New South Wales* (1964) 111 C.L.R. 210. *Richardson's Case* is cited at length by Barwick, C.J. in the *Queensland Bacon Case* (85 C.L.R. 110 at 129 cited by his Honour at 40 A.L.J.R. at 16). In particular his Honour cited the conclusions reached in *Richardson's Case* as follows: ". . . it is enough to decide that the payments into the office account possessed in point of fact a business purpose common to both parties which so connected them with the subsequent debit to the account as to make it impossible to pause at any payment into the account and treat it as having produced an immediate effect to be considered independently of what followed and so to be adjudged a preference." (40 A.L.J.R. 17.)

[22] *Supra* n. 21. This contention would also seem to have the support of *Rees* v. *The Bank of N.S.W.* (1964) (111 C.L.R. 210). In that case, a company had an arrangement with a bank whereby its overdraft was reduced by allowing the bank to control incoming funds. The bank directed which of the company's cheques were to be met. The liquidator of the company took the point of peak indebtedness in the overdraft account that the company held with the bank, and compared this figure with the amount owing at the date of the winding up. The difference he contended constituted a preference. The Court upheld this contention and directed that the bank pay that amount. However the case would appear to be distinguishable from the present facts on the same basis as the decision in *Richardson's Case*, in that there was a fixed agreement in existence.

[23] 40 A.L.J.R. 17-18.

[24] *Id.* at 19-20.

where the transaction involved has the effect of depleting the debtor's assets.[25] Barwick, C.J. concludes that both the fact and the extent of the preference are determined by the reduction or otherwise of the running account between the date of the impugned payment and the time of commencement of the liquidation. He did, however, concede that circumstances may justify selecting some earlier terminal point in such an inquiry.

Menzies, J. on the other hand, in the *Queensland Bacon Case*, took an entirely different view. He distinguished *Richardson's Case* on the basis that the payments to the bank account in that case were ". . . measured exactly by the payments to be made out of the account so that the account would remain as it was, notwithstanding the payments in and the payments out".[26] His Honour reasoned on the facts of the present case as follows:

> In the present case it seems to me that it was intended that, upon each occasion in the future when the appellant was to receive a cheque from its debtor, its position would be improved, notwithstanding current supplies and that the object of the arrangement was to bring about a reduction of an existing liability. Every payment having that effect would improve the position of the creditor and it is sufficient that the payment actually made should give the creditor some advantage over other creditors. I consider that payments made in the carrying out of such an arrangement could constitute preference, and His Honours findings that they were is not one that should be disturbed.[27]

Where there is a continuing relationship of debtor and creditor, it may be asserted that the depletion of the debtor's assets by payment to one creditor is being offset by the continued supply of goods. It is difficult, however, to justify adoption of Barwick, C.J.'s view in favour of that of Menzies, J. where the supply of future goods is to be reduced in volume. On the other hand, it may be asserted in favour of Barwick, C.J.'s view that even though a continuing relationship may involve the steady reduction of an existing indebtedness, this factor does induce the creditor to supply goods which otherwise would not have been supplied.

Kitto, J. did not consider the provisions of s. 95(1). He assumed the findings of Gibbs, J. to be correct and preferred to base his decision on the application of the other sub-section of s. 95.

Protected Payments

Section 95(2)(b) of the Bankruptcy Act protects the rights of a creditor who takes a payment in good faith, for valuable consideration and in the ordinary course of business. It was not contested in the *Queensland Bacon Case* that the payments attacked as preferences were made for valuable consideration and in the ordinary course of business, and it was accepted that creditors had no actual knowledge of insolvency at the time the preferential transactions occurred. However, when invoking the protective provisions the creditors were met with the contention that the payments received by them were not received in good faith.[28]

Section 95(3) of the Act provides that the burden of proving the matters in s. 95(2) lies on the person who relies upon them having been complied with. The subsection would appear to be clear in its import and in fact only Barwick, C.J. referred to its provisions. His Honour concluded that so far as good faith was concerned, the creditor needed only to prove that its officers were unaware that the debtor was in fact insolvent, and that they did not suspect insolvency.

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[25] See n.20 *supra*.
[26] 40 A.L.J.R. 30.
[27] 40 A.L.J.R. 31.
[28] 40 A.L.J.R. at 15 *per* Barwick, C.J. and see *infra*.

The creditor did not need to prove that its officers did not have reason to suspect that the debtor was insolvent; the onus of proof merely extended to disproving a subjective knowledge or suspicion of insolvency. Once it is proved by the creditor that he neither knew nor suspected insolvency, the onus falls on the liquidator to prove that insolvency, in all the circumstances, ought to have been suspected. It would appear that the creditor's opportunities to retain payments made by an insolvent debtor within six months of the presentation of a petition are considerably enhanced by this finding. It remains to be seen whether it will find support in subsequent cases.

Good Faith

There was a considerable divergence of opinion in the High Court as to the interpretation of s. 95(4). However, it was accepted that the determination as to whether a creditor acted in good faith required a full consideration of all the circumstances of the case.[29] Barwick, C.J. indicated that it was relevant that the creditors believed that the company was ". . . well managed, that it exercised a proper stock control, . . . and that the management of the company was in the hands of persons of integrity".[30] Kitto, J. observed that to all outward appearances the company's business was ". . . going well, its stores were well patronized, its management apparently energetic and efficient, its overhead reasonable, its assets substantial and readily saleable".[31] Two main factors were emphasised by the court: first, to all outward appearances the rate of realization of the debtors assets if the necessity arose, would be speedy,[32] and secondly, that at the time of the disputed transactions, credit restrictions were operating generally on the community so that it was fairly common to receive cheques dishonoured with the answer "present again in a few days".[33] These circumstances suggested to Barwick, C.J. and Kitto, J. that there was every indication that the debtor would be able to trade out of its difficulties if given a short period of time to do so.

It was accepted that the "inference" referred to in s. 95(4) was one to be drawn objectively by reference to what a prudent businessman in the creditor's position ought to have suspected irrespective of what assumption the creditor in fact acted upon. The court may be assisted in this regard by inferences drawn by businessmen at the time.[34]

As it was accepted by the court that no creditor had actual knowledge of insolvency at the time the preferential transactions occurred, the principal discussion of the sub-section evolved around the words ". . . had reason to suspect. . . ." The sub-section requires that the creditor suspect both the fact of insolvency, and that the effect of the transaction would be to confer a preference.

Kitto, J. dealt with the meaning of the word "suspect" in some detail:

> . . . the precise force of the word "suspect" needs to be noticed. A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to "a slight opinion, but without sufficient evidence", as Chamber's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look

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[29] *Per* Barwick, C.J. *ibid.* at 20; Kitto, J. *ibid.* at 25 ". . . the character of the circumstances is what has to be decided"; Menzies, J. *ibid.* at 30.

[30] *Id.* at 19.

[31] *Id.* at 26.

[32] *Per* Barwick, C.J. *id.* at 20 and 22.

[33] *Per* Barwick, C.J. *id.* at 20 and 22.

[34] Barwick, C.J. *id.* at 22 ". . . The question remains what is the proper inference which the court thinks a reasonable and prudent businessman should draw from those circumstances." Kitto, J. *id.* at 25.

into the possibility of its existance. The notion which "reason to suspect" expresses in sub-section (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes—a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.[35]

It is evident from the judgment of Barwick, C.J. that the creditor must suspect the debtor's actual insolvency. "It is not enough that the circumstances are such as to lead to the inference that the creditor had reason to suspect that the debtor *might* be insolvent . . . it is the fact of actual insolvency which must be known or suspected."[36] Barwick, C.J. concludes by drawing a distinction between doubting whether a debtor is solvent or insolvent and suspecting that he is in fact insolvent. His Honour considered that it is to the latter suspicion that s. 95(4) refers. The section only strikes at payments made by a debtor during "actual insolvency", and such insolvency must exist to be suspected. But it may be concluded that if the judges adopt an objective approach to s. 95(4), it will not be possible for creditors to prove good faith under s. 95(2), even though they did not suspect actual insolvency, but merely doubted the debtor's solvency, if the reasonable businessman would in the circumstances known to the creditor have made further enquiries to allay or confirm his doubts.

Nevertheless, it is evident that the requirement outlined by Barwick, C.J. that a creditor suspect the debtor's actual insolvency and not merely doubt his solvency, makes the task of the creditor in bringing himself within the protective provision of s. 95, a considerably less onerous one. It would appear that the judges by analogy would also be prepared to take a lenient view of the fact that a creditor had failed to suspect the preferential effect of any particular impugned transaction. Barwick, C.J. in fact suggests that where a payment is made in contemplation of the continuance of the supply of goods, the creditor cannot be deemed to suspect that he was receiving a preference.[37]

The "Suspicion" Aroused by Dishonoured Cheques

Barwick, C.J. and Kitto, J. concluded generally that the mere dishonour of a cheque is not of itself sufficient to give rise to a suspicion in all cases that a debtor is insolvent. When ascertaining the existence of a preference, Barwick, C.J. stressed the importance of considering the debtor's and creditor's dealings as one integral relationship based on the continuance of the supply of goods. On the other hand when considering whether the creditor, when receiving a preference, ought to have suspected insolvency or a preference, His Honour looked at each payment in turn and considered the surrounding circumstances as at the date of the impugned payment. Kitto, J. did not find it necessary to discuss the question of the existence of a preference and when dealing with the creditor's "suspicions", his views concurred with those of the Chief Justice.[38]

Barwick, C.J. in expanding his own viewpoint indicated that he regarded the decision of Gibbs, J. as being really based upon a finding of absence of good faith within the meaning of s. 95(4): this finding depended upon a view that by reason of the dishonour of a cheque given by the debtor prior to the date upon which insolvency was found to exist, the creditor ought at

[35] *Id.* at 25.
[36] *Id.* at 20. Italics supplied.
[37] *Id.* at 21 and 23.
[38] *Id.* at 25.

that time to have suspected insolvency and that subsequently nothing occurred up to the time of receipt of the payments impugned as preferences which would justify that suspicion being dispelled. In the view of the Chief Justice, however, this approach was untenable because on the facts as found, His Honour considered that a creditor could not be deemed to have reason to suspect insolvency to exist when according to the findings it did not in fact exist.

It would appear that the import of this view is that in considering the circumstances surrounding the receipt of an impugned payment for the purposes of determining suspicion of insolvency, regard can be had only to those anterior events which occurred after the commencement of actual insolvency. One may agree that a creditor ought not to be precluded from the protection of s. 95(2) merely because for the purposes of s. 95(4) he had reason to envisage the possibility that the debtor might be insolvent. That ought not to be enough to constitute a reason to suspect insolvency. But if a creditor by reason of a debtor's unsatisfactory dealings with cheques, does have reason to suspect insolvency and if that reason persists up to the time of an impugned payment, insolvency having supervened, it is not, with respect, easy to agree with His Honour's conclusion that a reason to suspect insolvency cannot be said to exist at the time of the payment. Notwithstanding that the original suspicions, although justified, were not correct, that which was in fact suspected, and which continued to be suspected has now eventuated. One may envisage the extreme example where a debtor, having conducted his business in such a way to give a creditor every reason to suspect insolvency, subsequently, unknown to the creditor, receives a gift from a friend which saves him from in fact being insolvent. If the debtor subsequently squanders the gift, so that he is reduced to insolvency, and then makes a preferential payment to the creditor, it is difficult to understand why the creditor should not be deemed to have reason to suspect insolvency by virtue of his previous suspicions where nothing has supervened, in his knowledge, to allay those suspicions.

Taking a narrow view of what circumstances "surround" a payment, Barwick, C.J. concluded that all payments except one to the Egg Marketing Board were saved by the protective provisions of s. 95. It is difficult to draw a distinction between the facts surrounding the payments that were saved and the facts surrounding the payment to the Egg Marketing Board, and His Honour, it is respectfully submitted, does not adequately explain the distinction.

Menzies, J. took a wide view of what circumstances ought to be taken into consideration when the question of the creditor's suspicion is being canvassed, and it is submitted that this wide view reached a more satisfactory conclusion on the facts of the present case. In confirming the conclusions of Gibbs, J. at first instance, His Honour stated:

> A retailer of goods whose circumstances are such that he is reduced to the desperate expedient of giving his wholesale supplier a bad cheque ought thereafter, until his solvency is established, at least to be suspected of inability to pay his debts. . . . Although it may be possible to imagine a case where enquiry would allay the suspicion naturally engendered by the dishonour of a cheque in the circumstances stated, I find it impossible to think that, upon dishonour of the cheque, the supplier could do otherwise than suspect that the reason for the dishonour was simply lack of funds. What debtor, able to pay, would, except in error, give his creditor a cheque that would be dishonoured? I cannot suppose that it would occur to a creditor, that a debtor, being able to pay his debts, had deliberately passed a cheque that would be dishonoured simply as a means of obtaining further credit.[39]

The creditors ought to be all the more suspicious because the dishonoured

[39] *Id.* at 30.

cheque was in payment of goods which in the ordinary course of business ought already to have been sold by the debtor for cash.[40]

Barwick, C.J. and Kitto, J. emphasised that their decisions were considerably influenced by the fact that the debtor appeared to have substantial and readily realizable stocks on hand. It appears, however, that the stocks supplied by the creditors in this case were perishables such as bacon, butter and eggs. It is submitted that the mere continued supply of goods of this nature, should not engender a confident expectation in a reasonably prudent businessman that such stocks would invariably be available for realization to meet the debtor's obligations. The value of such goods is regulated entirely by market demands and it was conceded in this case that ". . . fluctuations in demand . . ."[41] at times disappointed sales expectations.[42] In view of prevailing general restrictions on bank credit, creditors should have realised that the debtor might experience extreme difficulty in disposing of the goods in sufficient volume to meet its liabilities.

Barwick, C.J. and Kitto, J. were prepared to concede that dishonour of a cheque is a matter sufficiently serious to put the creditor on enquiry as to the debtor's solvency. Nevertheless in all cases bar the one payment to the Egg Marketing Board they found that the creditors satisfied the requirements of s. 95(4). It was conceded that each of the creditors was not aware that cheques in favour of other creditors were being dishonoured. Nevertheless it is submitted that where cheques are repeatedly dishonoured, a creditor should make extensive enquiries which on the facts of this case, in revealing the debtor's overall credit situation, would have been a sufficient indication of insolvency, at any rate, after 1st November, 1960, to prevent the creditors taking advantage of the protective provisions of s. 95 to the detriment of the general body of creditors.

Conclusion

One may criticize the limiting effect of the decision in the *Queensland Bacon Case* upon the operation of the preference provisions of the Bankruptcy Act. By extending the operation of the protective provisions of s. 95, the Court has, in effect, defeated the reasonable expectations of the commercial community to an equitable sharing of the assets of an insolvent debtor.

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THIRD PARTY CONTRACTS

BESWICK v. *BESWICK*
COULLS v. *BAGOT'S EXECUTOR & TRUSTEE CO. LTD.*

In both commercial and domestic transactions, agreements are made between two parties, whereby in return for consideration supplied by one, the other party contracts to confer a benefit on a third party. While as a matter of policy there would seem to be little reason for denying that third party the means of enforcing a contract made for his benefit, the courts have

[40] Menzies, J. *id.* at 29-30.
[41] *Id.* at 24.
[42] *Id.* at 24.