Appearing in the High Court:
A Case Study of *Metal Manufactures Pty Ltd v Morton* (2023) 275 CLR 100 John McKenna KC and Paul O'Brien
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1. For the Queensland legal profession, appearances before the High Court are not an everyday experience.

2. If we look at the statistics, it is easy to see why:

- Last year, a total of only 43 substantive matters were determined by the High Court from the whole of Australia – and this included constitutional matters commenced in the High Court.

- The reason for this low number is that most matters can only come to the High Court if a grant of special leave to appeal is obtained.

- This special leave gateway is guarded very carefully indeed.

- On 5 June 2024, when the most recent batch of decisions were issued on special leave applications, only one matter received special leave and 17 were refused. So the success rate that day was about 6%.

- As a result, at any given time, there are only about four matters from Queensland which have actually obtained a grant of special leave to appeal and are in the course of resolution before the High Court.

3. Having said that, in any given year, there are about 250 matters determined by the Queensland Court of Appeal.

4. In a significant percentage of those matters, the unsuccessful party is likely to at least raise the question of taking the matter further to the High Court of Australia.

5. So, at the very least, we all need to know enough about practice in the High Court to be able to give sensible advice in cases of this kind.

6. For most lawyers who have had the privilege to be involved in matters in the High Court, the experience has made them a much better lawyer generally.

7. It is an experience that causes you to think harder and differently about matters, in a way which can change your approach to the more difficult matters we have to deal with on a day to day basis.

8. So our plan in this lecture is to use the *Morton* case as a case study, to provide you with a better feel for the kind of matters which are genuine candidates for a grant of special leave to appeal – and then to outline what is involved in preparing a matter like this for a hearing in the High Court.

Facts and Issues

9. Gavin Morton (*Liquidator*) was appointed as the liquidator of MJ Woodman Electrical Contractors Pty Ltd (in liquidation) (*Company*) in 2018.

10. Metal Manufactures Pty Ltd (*MM*) in the period before MJW was wound up sold electrical goods to MJ Woodman Electrical Contractors Pty Ltd (*MJ*) on credit terms.

11. Six months before its winding up:

(a) MJ owed approx. $384,000 to MM for electrical goods supplied to it;

(b) MJ made payments of $50,000 and $140,000 to MM.

12. Morton commenced proceedings against MM to recover these payments as unfair preferences under ss 588FA and 588FF of the *Corporations Act.*

13. Section 588FA provides that:

A transaction is an unfair preference given by a company to a creditor of the company if, and only if:

(a) the company and the creditor are parties to the transaction (even if someone else is also a party); and
(b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;

even if the transaction is entered into, 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.

14. A primary purpose of the unfair preference provision in s588FA is to deter, and where necessary remedy, actions which bring about an inappropriate depletion of the net pool of company assets in circumstances of insolvency.[1]

15. Another purpose is to ensure equal sharing between creditors in accordance with the *pari passu* principle.[2]

16. Section 588FF relevantly provides that:

(1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:

(a) an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction; (emphasis added)

17. Section 588FF provides for the powers of the Court and remedies that may be sought. Subsection (1)(a) was the applicable provision in this proceeding.

18. In this section there are two features to note. First, this is a liquidator's claim and is not a claim of the company. Secondly, however, if an order is to be made it is for payment to the company.

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1 *G & M Aldridge v Walsh* (2001) 203 CLR 662 at [29] and [30]
2 *Ibid and see BP Australia v Brown* (2003) 58 NSWLR 322[92] to [97]

19. These two features were raised and argued both before the FFC and the HCA.

20. In response to the claim, MM raised a number of defences which relevant for today, included set-off under s 553C of the Corporations Act. MM asserted that it was not liable to pay the claimed amounts because it was still owed approx. $194,000 by MJ at the time of liquidation and entitled to rely on that debt to set-off the liquidator's claimed amount under s 553C of the Corporations Act.

21. Section 553C is in the following terms:

> *(1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:*
> *(a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and*
> *(b) the sum due from the one party is to be set off against any sum due from the other party; and*
> *(c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.*
> *(2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.*

22. There are some relevant features to note in this section.

23. It deals with mutual credits, mutual debts or other mutual dealings. “Mutuality” was a key consideration in this case.

24. An earlier HCA authority was critical to the decision of the FFC and the HCA. In *Gye v McIntyre* at 623 it was said that there are three aspects to mutual dealing:

> *“The first is that the credits, the debts, or the claims arising from other dealings be between the same persons. The second is that the benefit or burden of them lie in the same interests. In determining whether credits, debts or claims arising from other dealings are between the same persons and in the same interests, it is the equitable or beneficial interests of the parties which must be considered: see, eg, Hiley. The third requirement of mutuality is that the credits, debts, or claims arising from other dealings*

> *must be commensurable for the purposes of set-off under the section. That means that they must ultimately sound in money."*

25. The other important issue was timing of the application of the set off and how calculations were meant to be undertaken of what was due from one party to another.

26. Although it is not stated in s 553C expressly, it has been recognised that it operates automatically upon the occurrence of the winding up so as to bring about an extinguishment of the claims at that date to the extent of the set off. See *Gye v McIntyre* (1991) 171 CLR 609 at 622.

27. The purpose of including a set-off provision in the statutory scheme is to deal with the potential for unfairness to a person who has engaged in "genuine" mutual dealings with the company. The potential for unfairness arises because a person may be legally obliged to meet its ordinary obligations to the company in full, but then only be able to prove in the company's liquidation for a rateable distribution on its cross-claim. For this reason, a statutory exception to the *pari passu* principle was created (now under s 553C), to allow a specific class of mutual claims to be set off against each other. (see *Gye* at 619)

28. In terms of s553C(2), the parties agreed that MM did not have notice that the Company was insolvent on the date it gave the relevant credit to the Company so that s553C(2) did not apply.

29. The Liquidator conceded that if set off was available, the recovery proceeding must fail as the quantum of the amount owing to Metal Manufacturers by the Company exceeded that of the alleged preference.

30. In these circumstances, on the application of the liquidator, Justice Derrington exercised the power in s 25(6) of the *Federal Court Act 1976* (Cth) to reserve a special question for the consideration of a Full Court:

> *"Is statutory set-off, under s 553C(1) of the Act, available to the defendant in this proceeding against the plaintiff's claim as liquidator for the recovery of an unfair preference under s 588FA of the Act?"*

The decision of the FFC

31. The FFC accepted the contentions of the liquidator and decided that setoff was not available.

32. In summary it found:

> ***[7]*** *There is a lack of mutuality between the indebtedness of the company to the creditor and the liability of the creditor pursuant to court order to pay the company at the suit of the liquidator. The lack of mutuality arises from the different interest in which the company owes money to the creditor and in which the company receives money pursuant to the liability to repay not as a creditor of the preferred creditor, but as a payee pursuant to court order in an action brought by the liquidator in the execution of her or his duty to gather in the estate of the insolvent company for the benefit of all unsecured creditors and the administration of the estate. The lack of mutuality also arises from the absence at the relevant date of any right or equity (vested or contingent) in the company or duty or obligation (vested or contingent) in the creditor to recover or to repay the preference, respectively.* (emphasis added)

33. The Court found there was no mutuality for the purpose of s553C for two reasons:

(a) a lack of mutuality because of the different interests of the parties (different interests of the 2 parties);

(b) the absence at the relevant date of any right or equity in the company or duty or obligation in the creditor to recover or repay the preference (timing is off).

34. It can also be seen from the decision in [8] that the Full Federal Court undertook the statutory interpretation exercise considering the legal context before the 1992 Corporate Law reforms, the text of the changes made by the 1992 reforms, the context of the changes including the history, secondary materials and lack of any purpose to bring about a significant change. They went on to say at [8]:

> *"…This construction and conclusion best reflects and vindicates the underlying purposes of both the law of set-off in insolvency and the law of preferences: by justly protecting creditors where genuinely reciprocal or mutual debts, credits or mutual dealings exist by netting such off in working out what is owed by and to the insolvent estate.."*

35. The Court went on to say that this:

> *"…process in no way interferes with the pari passu distribution from the estate being part of an antecedent process to establish the estate and the claims upon it; and by ensuring that past preferential transactions are unwound to put the estate in the position in which it would have been had the preferential transaction not occurred, so that thereafter all creditors (including the erstwhile preferred creditor) may share equally in an estate unaffected by earlier preferential transactions."*

36. MM then applied for special leave to appeal to the HCA, which was granted.

37. The HCA did not give reasons for the grant of special leave, but at the time of this proceeding there was considerable uncertainty within the insolvency sector about the application of s553C in the context of these claims. There was a history of cases which suggested that set off was not permitted (including Australian cases going back to about 1931 and English cases back to about 1908)[3]. However, more recently and after the 1992 Corporations Law reforms, there were Australian cases which suggested that set off was permitted (*Re Parker* in 1997 is an example).[4]

Grounds for appeal to HCA

38. There were three grounds of appeal to the HCA.

39. **Ground 1** – It was contended that the FFC incorrectly correctly held that there is a lack of mutuality between the interests of the creditor on the one hand and debtor company on the other, and incorrectly distinguished the interest in which the company receives funds in this context and the interest in which the creditor has its own claim against the company.

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[3] *Calzaturificio Zenith Pty Ltd (in liq) v NSW Leather & Trading Co* [1970] VR 605; *Hamilton v Commonwealth Bank of Australia* (1992) 9 ACSR 90 at 107-108; *Re Amour* (1956) 18 ABC 69; *Re Smith* (1933) 6 ABC 49; *Re Grezzana* (1932) 4 ABC 203; *Re Clements* (1931) 7 ABC 255 *In re a Debtor* [1927] 1 Ch 410 at 420; *Lister v Hooson* [1908] 1 KB 174 at 176-177.

[4] *Shirlaw v Lewis* (1993) 10 ACSR 288 at 295-6 (set off allowed against void disposition claim under s 468; *Re Parker* (1997) 80 FCR 1 at 11-12 (set off allowed against s 588W compensation claim); *Hall v Poolman* [2008] NSWSC 1842 (***Hall***) at [431] (set off allowed against s 588M compensation claim); *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47; [2011] NSWCA 109 (***Buzzle***) at [271]-[278] (dicta accepting that set off allowed against s 588FB claim); *Smith v Boné* [2015] FCA 319 (***Smith***) at [417]-[423] (set off allowed against a s 588M compensation claim)

40. **Ground 2** – The appellant contended that the FFC erred in finding that "the Second Respondent [company] does not have an existing right or claim (vested or contingent)" against the creditor at the relevant date.

41. **Ground 3** - The appellant contended that: "The Full Court erred in finding that the failure of the Parliament to incorporate the recommendation of Australian Law Reform Commission as to the proposal with respect to the form of s 553C, did not evince an intention by the Parliament to permit the application of statutory set-off in circumstances involving the recovery of unfair preferences".

The decision of the HCA

42. The joint judgment, given by four Justices of the Court, started with a survey of the statutory scheme and with a discussion of some key features of the law of insolvency.[5]

43. **First**, it was noted that a company in liquidation does not hold its property on trust for creditors and members. It was held that the statutory regime is both an extensive and sufficient measure for the distribution of the company's property which does not need the intervention of equity.

44. The majority also reiterated that the company remains the beneficial owner of all the property gathered in an controlled by the liquidator, with the company also being the beneficial owner of all payments received during the winding up including any payments made to it pursuant to s 588FF(1).

45. It was noted, however, that such property of the company was subject to the statutory scheme of liquidation.

46. It was also noted that creditors have a special interest in these funds - namely to have assets of the company gathered in and distributed.

47. **Secondly**, the majority also looked at the scheme and found that s 553 creates an important cut-date to determine what debts and claims are provable. They reiterated the finding of the FFC that only debts and claims against the company

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[5] MM at [5] to [14]

arising from circumstances which had occurred before the relevant date could be included:

> ***[9]*** *It follows from acceptance of the proposition that the company remains the beneficial owner of all the property gathered in and controlled by the liquidator that it also is the beneficial owner of all payments received by it during the course of the winding up. This includes payments made to the company by order of a court pursuant to s 588FF(1) of the Act. That is not to deny, however, that the property of the company and any payments or transfers of property made to the company during the process of winding up are subject to the "statutory scheme of liquidation".*
>
> ***[12]*** *Section 553 creates an important cut-off date to determine what debts and claims are provable in the winding up. As Allsop CJ observed below, a critical feature of this provision is that it addresses only debts and claims against the company arising from "circumstances" which had occurred "before the relevant date" . Here, the "relevant date" is the date when the winding up of a company is taken because of Div 1A of Pt 5.6 of the Act to have begun . ..*
>
> ***[13]*** *The purpose of s 553 is important. As Campbell JA observed in BE Australia WD Pty Ltd (subject to a deed of company arrangement) v Sutton, s 553 ensures that all legal obligations to which a company is subject are ascertained and then valued "at a common date", so that they can be taken into account in the winding up. Critically, and subject to one possible exception , no debt or claim arising from circumstances arising after the commencement of the winding up of the company is admissible to proof against the company in the liquidation."*

The decision on s553C

48. Having discussed the conceptual framework of the statutory scheme, the joint judgment turned to the grounds of appeal.

49. Dealing with the timing issue first, the joint judgment held that there was no mutuality:

(a) In the context of the statutory scheme of liquidation, s 553C(1) requires that the mutual credits, mutual debts or other mutual dealings be credits, debts or dealings arising from circumstances that subsisted in some way or form before the commencement of the winding up.

(b) That is because under that statutory scheme, s 553C exists in aid of s 553, which is concerned with debts and claims, whether "present or future,

certain or contingent, ascertained or sounding only in damages", arising from "circumstances" that had occurred before the commencement of the winding up. Such a claim could only be made after the date of the winding up.

(c) They went on to apply that to the case at hand and found that at the date of the winding up (the relevant date), there could be no set off because the appellant owed nothing to the company. They explained this by staying that at the relevant date, the capacity of the liquidator to bring an unfair preference claim did not exist.

(d) Immediately before the commencement of the winding up of the Company there was nothing to set off as between MM and the Company.

(e) The Company owed money to MM, but they did not owe money to the Company. The Liquidator's ability to initiate this dispute under section 588FF did not exist prior to their appointment. Instead, this emerged as a new statutory right that became effective only upon the Liquidator's appointment to the Company.

50. It was held that:

> ***"[45]*** *The appellant's case turned upon the presence as at the date of the commencement of the winding up of an inchoate or contingent right to sue under s 588FF(1) which was capable of growing or maturing into a money claim that could then be set off against the amount owed by MJ Woodman to it. That proposition suffers from a fatal flaw. Construed in the context of the statutory scheme of liquidation, s 553C(1) requires that the mutual credits, mutual debts or other mutual dealings be credits, debts or dealings arising from circumstances that subsisted in some way or form before the commencement of the winding up. That is because under that statutory scheme, s 553C exists in aid of s 553, which is concerned with debts and claims, whether "present or future, certain or contingent, ascertained or sounding only in damages", arising from "circumstances" that had occurred before the commencement of the winding up. That is why s 553C(1) refers to a "person who wants to have a debt or claim admitted against the company" and then provides that only the balance of any set-off is "admissible to proof against the company, or is payable to the company, as the case may be". As such, the function and purpose of s 553C is to permit a reckoning of amounts owing to and by the company during the relation-back period prior to the appointment of the liquidator.*
>
> ***[46]*** *Here, immediately before the commencement of the winding up there was nothing to set off as between the appellant and MJ Woodman; the*

company owed money to the appellant, but the appellant owed nothing to the company. Moreover, the inchoate or contingent capacity held by the liquidator to sue under s 588FF could not and did not exist before then . It could only be made following the commencement of the winding up. It was wholly "new" in the sense described by Dixon J in Hiley. It sprang into existence as a specific statutory right held by the liquidator for the purposes of recovering preference payments to secure the equitable distribution of assets amongst creditors. As such, it was not eligible to be set off against the pre-existing amount owed to the appellant."

51. As to the issues about mutuality of person and interest, it was held that:

(a) There was no mutuality of dealings as MM's claim was against the Company, whereas the Liquidator's claim to recover the preferential payments was brought in the Liquidator's own right as an officer of the Court (not as agent for the Company) – so there was no mutuality as to the same persons:

> ***"[52]*** *In any event, any such liability could not constitute a mutual credit, mutual debt or mutual dealing with the pre-existing amount owed by the company for two further reasons. First, there had been no dealing between the same persons. The alleged unfair preferences were paid during the relation-back period by MJ Woodman to the appellant. The liability created by s 588FF(1)(a), whilst owed to the company (which will receive it beneficially), is nonetheless one that arises upon the application of the liquidator, who, for the reasons given above, does not do so as an agent of the company but rather in his or her own right as an officer of the court."*

(b) There was also no alignment of interest because the full amount of the alleged preferential payments recovered by the Liquidator could not be considered a benefit to the Company. These proceeds must be used to pay priority creditors and be distributed among the general body of unsecured creditors according to the pari passu principle outlined in section 555 of the Act:

> "***[53]*** *Secondly, there is no mutuality of interest. Contrary to the contentions of the appellant, that consideration is not confined to determining whether both parties are beneficially or legally entitled to what they are owed. As the Court of Appeal of the Supreme Court of Western Australia recently observed, a consideration of the benefit of equitable interests in a transaction is but an example of when two parties can enjoy mutuality of interest.*

> ***[54]*** *Here, on no view can it be said that the entire amount which the liquidator will recover under s 588FF(1)(a) will be "for his own benefit" or indeed for the benefit of MJ Woodman. That is because, for the reasons expressed above, that amount must be applied under the statutory scheme of liquidation and be made available, amongst other things, for the making of priority payments and for distribution to creditors in accordance with the pari passu principle. Given the obligations and duties imposed by the statutory scheme, it cannot be said that the interest the appellant has in being paid by MJ Woodman is the same as the interest of both the liquidator and the company in recovering the preferential payment. The liquidator's right of recovery is not comparable to a trading transaction whereby goods or services have been previously supplied to a company; it is a unique statutory ability to recover the proceeds of a voidable transaction."* (emphasis added)

52. In relation to Ground 3, the appellant relied upon the ALRC General Insolvency Inquiry report (Harmer Report) to submit that the parliament decided not to enact an express exclusion in s553C for voidable transactions. This ground was also dismissed, because no exclusion for voidable transactions was ever needed.

53. The majority also found that:

> ***"[58]*** *The presence of s 588FI within the statutory scheme of liquidation supports the outcome here. It will be recalled that this section applies when a creditor who has received an unfair preference has "put the company in the same position as if the transaction had not been entered into" . The creditor may then prove in the winding up as if the transaction had not been entered into. Permitting a preferred creditor to set off its liability under s 588FF(1)(a) with the liability owed to it by the company would undermine a purpose of the recovery of unfair preferences, revealed by this section, which is to restore to the pool of distributable assets those payments made under voidable transactions. A set-off, in contrast, would leave that pool diminished, for the reasons already expressed. Such an outcome can hardly have been intended."*

54. The HC found that the Full Court was correct to answer the question "no" and dismissed MM's appeal.

Suitability for HCA?

55. Having discussed the detail of the *Morton* case, the first of the more general topics to discuss concerns how to identify matters that at least have some prospect of obtaining special leave to appeal to the High Court.

56. In general, there are five characteristics to look for – and all of which were present in *Morton.*

57. **First**, the matter should ideally raise issues of general application across Australia.

58. So matters turning upon the particular provisions of Queensland statute law are more difficult. But matters concerning Federal legislation, or national scheme legislation, or common law are more viable.

59. *Morton* satisfied this requirement because it concerned the Corporations Act.

60. **Secondly**, the matter should ideally raise issues which have common application.

61. So again, odd or quirky matters which give rise to issues which are interesting but unlikely to arise again are more difficult. But matters which are of practical importance to the operation of the legal system are more viable.

62. *Morton* satisfied this requirement because it concerned preference recovery actions - and potentially other similar actions - by liquidators. These are very common. And it concerned the potential for a defence of set-off being raised by a defendant, based upon other debts owed by the company - which exist in a very large proportion of insolvencies.

63. **Thirdly**, the matter should need the intervention of a final appellate court to resolve an issue which has not been able to be satisfactorily resolved by the ordinary run of litigation and appellate review.

64. This most obviously occurs where there are differences between intermediate appellate courts, or where an intermediate appellate court decision is subject to legitimate judicial or academic criticism, or where a group of first instance decisions which seem to lack direction or coherence.

65. Again, *Morton* satisfied this requirement. There had been a series of first instance decisions, about a range of different types of liquidator recovery claims, which were inconsistent but generally favoured a defence of set-off. These decisions had received some support at appellate level. However, this led to a respected academic commentary, Dr Derham, analysing this line of cases in an ALJ article (and in his standard text on set-off) and strongly favouring the no set-off analysis.

66. In *Morton*, in the Full Federal Court, the court favoured a no set-off approach for preference cases – but left the other categories of case unresolved. So there was a real need to for High Court intervention.

67. **Fourthly**, the matter should ideally require the court to look into fundamental conceptual issues about the purpose or principles which apply in an area of the law – so that the High Court's involvement will provide a basis for coherently dealing with other related issues in this area.

68. Again, *Morton* had this feature. It was concerned with the purpose of the preference provisions, the purpose of the set-off provisions, the relationship between the two, and a number of governing principles including the concept of "mutuality" and the basis upon which a liquidator is acting in seeking preference recoveries. These are building block issues in this area of the law which, if clarified, would assist the coherent development of this area.

69. **Finally**, and very importantly, the matter should provide a suitable vehicle for the question to be resolved. Ideally, the key issue should be presented in a case where all potentially relevant facts are either agreed or clearly determined – with the matter turning upon the resolution of the key issue.\

70. In *Morton's* case, the Primary Judge and the parties identified – from an early point - that this case had the potential to require the involvement of the High Court. So it was prepared in a way which gave it the best chance to receive special leave. The case was prepared by way of case stated, which

set out all potentially relevant facts in a clear and uncontroversial way. Concessions were made on either side to remove subsidiary issues. So the result was that the key conceptual issues became the determinative issues in the matter.

71. It is certainly not the case that all five of these characteristics are required to obtain special leave – or that even if a matter has all these five characteristics there is any assurance of a grant of special leave.

72. But considering a case like *Morton* helps calibrate any assessment about the kind of matters which most commonly fall within the special group of 40-50 cases which the High Court actually hears and determines in any given year.

73. It also suggests what can be done, during the course of a matter, to maximise the chance of a successful application for special leave to appeal.

74. This is the next topic for consideration.

Maximising the Prospects of Special Leave

75. This discussion now proceeds upon the assumption that a matter has the potential to raise a general question of real importance.

76. In this situation, the question is how to create a suitable vehicle for the issue to be properly considered by the High Court.

77. In practical terms, what this involves is:

- considering, from the outset, what the essential argument in the High Court would be on this point.

- identifying comprehensively all the key factual findings that are needed, to allow this argument to be considered by the High Court.

- conducting the case – in pleadings, evidence and submissions – in a way which seeks to get a clear and complete set of factual findings from the primary court.

- conducting the case in a way which requires the courts below to set out, analyse and resolve the key legal arguments you wish to make about the point – even if the court is required to conclude that they are bound by existing authority to take an adverse position.

78. If this approach is taken, then the matter presents authentically as one worthy of serious attention by the High Court.

79. Put differently, the matter doesn't look like a case where some point is being manufactured – after the event – to seek to stage a further challenge to an appellate decision.

80. Which then brings me to the third point, which concerns the special leave application itself.

Special Leave Application

81. From late last year, the practice in relation to special leave applications changed.

82. Previously, save in clear cases, special leave applications proceeded in two stages.

83. There was first an exchange of written submissions, then the matter was set down for a brief oral argument before a court of two or three Justices.

84. Now the general practice is for all seven Justices to consider all special leave applications – but to do so only on the papers.

85. As a consequence, the fate of most special leave applications turns upon:

- the text of the judgment at first instance and on appeal to the Court of Appeal.

- the way the applicant puts the written application for special leave.

- the validity of any points made by the respondent in their written response to the application.

86. We have already discussed the way the shape of the primary judgment, and the intermediate appeal court judgment, can be influenced. This involves explicitly seeking from the court:

- the key findings of fact which are required.

- consideration of the key legal arguments which arises from those facts.

87. When a court does this, it makes it so much easier in the written special leave application to demonstrate:

- the importance of the point, to the current case and more generally.

- the difficulties or shortcomings arising from the court's analysis.

- the suitability of the case as a vehicle for consideration of the matter.

88. Turning now to the special leave application itself, there are five key points to make.

89. **First**, the High Court is highly prescriptive of the form of these applications.

90. As a result, many applications for special leave are rejected by the High Court Registry because prescribed formalities have not been complied with. So there are two lessons here:

- be very careful about the formalities required.

- don't leave filing until the last minute, because there is a high chance that there will be an unforeseen problem resulting in the application being rejected.

91. **Secondly,** the time period for filing a special leave application is very short.

92. The time period is only 28 days from judgment – and the application which has to be filed is not just a formal document. It has to contain a full set of the submissions to be made.

93. The obvious difficulty is that parties generally:

- do not have much advance notice of when a QCA judgment is to be delivered.

- can't know the outcome and the reasoning until the judgment is delivered.

94. So the key lesson here is the need for anticipation. It is necessary to approach the case on the basis that special leave may need to be sought on short notice.

95. **Thirdly,** the prescribed form for a special leave application is quite short.

96. You will see from the rules that it is to be no more than 12 pages.

97. However, the application is required to be organised in a very specific way, with six parts.

98. These parts include the proposed grounds of appeal, the orders which will be sought on appeal, a list of authorities and the full text of relevant statutory provisions.

99. So in practical terms, the submissions themselves may need to be confined to about six pages of text in 12 point font and 1.5 line spacing.

100. In trying to work within these parameters, it helps a great deal if the detail of the argument is already set out in the judgments below – and the focus of these submissions can be on why the issue is important and why the analysis below is wrong.

101. Fourthly, in Part II of the application it is necessary to frame the "special leave questions".

102. In some ways, this is the most critical part of the application and requires a great deal of thought. There are a few points to be made here:

- Ideally, the questions should be framed concisely, accurately, and in a way which conveys their general importance – not just to this matter, but to the legal system more generally.

- If possible, the questions should be framed in a way which suggests that a favourable answer to the question is not only arguable but a fair and sensible result.

- If possible, there should be only one or two questions – so the appeal is confined to issues that are of public importance, not every point in the case.

- Ideally, there should be a close nexus between: (a) the special leave point; (b) the grounds of appeal; and (c) the orders sought, In this way, a favourable answer to the special leave point establishes the grounds of appeal, and results in the orders sought.

- To the extent that there are additional points, which also need to be successful before the High Court in order to obtain the orders sought, that is a matter of concern.

103. Fifthly, in Part III of the application there should be a brief statement of argument in favour of the special leave application. This needs to establish the kind of factors discussed earlier. The object is not only to demonstrate

the error in the decision below – but also the general importance of the point and suitability of the vehicle.

104. Which leads to the next point, which concerns the kind of legal analysis required in the High Court to demonstrate error in the court below.

Legal Analysis in High Court

105. Not surprisingly, the kind of analysis required in the High Court is distinctly more rigorous, intense and broad-ranging than in other courts.

106. It is important to understand the reason for these differences.

107. **First**, there is inherent resourcing of the court. The High Court operates with a panel of five or seven of the leading judicial minds in the country. They are supported by Associates of the highest calibre. And their workload is limited in a way which allows the Court to produce the highest quality of analysis of the 40-50 matters heard every year.

108. **Secondly**, there is the breadth of experience - and the differences of perspective - brought to each matter by the panel of Justices. Collectively, the Court has deep knowledge of virtually every facet of Australian law – as well as the law of other major common law jurisdictions. And individually, each member of the Court brings their own particular background and approach to matters. This leads to a more diverse and questioning approach.

109. **Thirdly**, whilst quite respectful of the High Court's own judgments, the Court approaches other authorities with a healthy scepticism. So existing caselaw in a particular area has to stand on its own merits – not simply upon its past acceptance over time.

110. **Finally**, there is the sense of responsibility which is borne by the Court. For a great many areas of the law, the court only revisits a topic every five or ten years – and every tangential comment made then reverberates and influences the development of the law in the years to follow. So in each matter, the care taken in every step of the analysis is of the highest order.

111. What this means is that legal analysis, in most cases, is undertaken using a more rigorous and sophisticated approach than is usually undertaken in lower courts.

112. You can see the differences in the *Morton* case, when you compare the analysis of the High Court with earlier decisions in this series.

113. The first point of difference involves a careful analysis of the historical context.

114. Most statutes or common law principles don't just appear unannounced.

115. They usually arise from some kind of concern or shortcoming in the law. To deal with this concern, a solution is developed by the courts or by Parliament. Almost always, the solutions involve borrowing and adapting existing legal concepts, terms, or approaches. This solution then evolves and develops over time.

116. In most matters, before lower courts, there is simply no time to gain a clear understanding of the historical context in which an area of the law has developed. But in virtually all cases in the High Court, this is a fundamental starting point.

117. *Morton*'s case was no different. That is because the preference and set-off provisions could be traced to early bankruptcy and company liquidation statutes in England – which in turn borrowed from common law concepts. So there was a rich and detailed history which provided context. As this was explored in great detail by the Full Federal Court, there was no need to repeat this historical background by the High Court. But references to the purpose and genesis of the provisions underlie the reasoning throughout the judgments.

118. The second point of difference may be described as a focus on underlying concepts.

119. Most legal rules are constructed using key concepts – concepts such as causation, authority, ownership etc. However, in most matters, there concepts are glossed over – and not defined or expressed with sufficient precision.

120. In the *Morton* case, the outcome of the case really turned upon four key concepts:

- What was the inherent nature of a statutory claim brought by a liquidator. Was it brought as agent for the company? As a statutory trustee? Or in some unique statutory capacity?
- At what precise time is the question of set-off to be determined? Is it immediately before liquidation occurs or immediately after?

- How fully formed must a claim be to qualify for set-off?

- What is the concept of "mutuality" which is used to set-off?

121. These were all key concepts, which underlay the legislation, but the meaning of which had not been fully considered by prior authorities.

122. The third point of difference relates to purpose and coherence.

123. Most courts, of course, seek to construe provisions in context and having regard to purpose.

124. But you will see in the *Morton* decision how carefully the court considered the whole structure of the statute, the competing purposes of the various provisions, what this implied about the meaning of the key concepts, and how these provisions could be construed to work coherently together.

125. The fourth point of difference involves a search for analogies within the legal system – with a view to ensuring that analogous issues are resolved across the legal system in a consistent way.

126. In the *Morton* case, this was not a focus of concern – but in other matters it is important to anticipate interest by the Court beyond the immediate context of any particular issue.

127. The fifth point of difference involves a search for guidance from other legal systems.

128. In the *Morton* case, there was limited scope for this, because of the particular provisions of the relevant Australian statutes – but in most cases it is necessary to expect interest by the Court in how other relevant legal systems have resolved similar issues.

129. The final point of difference involves a consideration of consequences - particularly with a view to testing a range of foreseeable future cases, and their consequences, against competing approaches.

130. In the *Morton* case, in my view, the single most important forensic point was a worked example of the financial consequences of the two competing approaches – an example which demonstrated the distorting effect which the set-off approach would produce upon the *pari passu* principle.

131. So coming back to the special leave application, it is important to understand that the High Court approaches legal analysis using a precise, rigorous and broad-ranging approach of this kind.

132. In preparing an outline, precision of thought and expression is critical, because you can be assured that seven different Judges are looking at your every word – and every citation – and testing its accuracy and the rigour of the logic.

133. Assuming success on the special leave application, the final topic to consider is the preparation and presentation of the matter on appeal.

Appeal Hearing

134. The High Court Rules and Practice Directions have their own unique system for preparing core appeal books, books of further material, outlines of

argument and joint bundles of authorities. So it is necessary to be conscious of this and follow this system to the letter.

135. The Court also requires each party to hand up a three page skeleton outline of their oral address.

136. Once the oral argument commences, however, the presentation of an appeal in the High Court is very similar to other appellate courts.

137. There are just a few matters about the oral addresses to mention.

138. **First**, there are some general points to make about the court:

- Court No 1 is very large – so prepare yourself for an unfamiliar feeling in addressing 5 or 7 Judges.

- Ironically, Court No 1 is also quite an intimate court – as the distance from the bar table to the Justices is still quite short.

- There is a central lectern for use by all counsel addressing the Court. In a two party appeal, this does not give rise to any complications – as each counsel sits adjacent to the lectern. But if there are more parties involved, it necessary to make arrangements which will allow you to either move your materials to the lectern or make way for other counsel to take your place.

- Whilst the court is very polite, it can be impatient. Time is critical and so focus and economy of expression is encouraged.

- The Court is also quite interventionist. So it is necessary to work out, in advance, a strategy to deal directly with questioning but still actually cover all necessary points within the allotted time.

139. ***Secondly,*** to help deal with interventions, the skeleton outline is important:

- It communicates to the court your proposed structure, which may lead the Justices to defer some questions to the relevant time.

- It also provides you with a structure to return to after any intervention.

140. ***Thirdly***, the oral address is intended as an opportunity to persuade the Court in a way which cannot be done in writing. This may involve taking the court to particular authorities to properly make the point. But in many cases that will be a waste of valuable court time. The focus should be on explaining and developing the best points in support of your case – and rebutting the best points against your case.

141. ***Finally,*** it is critical to have prepared in advance for the key interventions you can anticipate receiving – as it will simply be too late to develop a coherent response on the spot:

- Some will be "what do you mean by that?" questions.

- Some will be hypothetical questions – testing the consequences of different approaches.

- Some will take your opponent's best points and seek a direct response.

- Some will be exploring analogies.

142. On a very practical level, you also need to make arrangements to access the court building and obtain a preparation room. Booking should be made for a practitioner room on Level 6, together with passcards which allow you to use the lift down to the courtrooms. The procedure is then to enter the court through the practitioner's entrance in the lower level of the building, go through security screening, obtain your passcard, then set yourself up in the allotted room.

143. You should also prepare for the unexpected.

144. The folklore of the Bar abounds with stories of silks taking ill on the eve of a High Court appeal – or being informed at court that they have a conflict and cannot appear – with the junior having to step up and argue appeal themselves.

145. In a very small way, *Morton* adds to these stories. Upon arriving in Canberra Airport the evening before the hearing, our airline managed to lose the suitcase which contained senior counsel's carefully highlighted and tabbed appeal books and authorities. The suitcase was eventually found – but only after the appeal was over and we returned to Canberra Airport for the flight home. At the time, we gave thanks for the preparation which had gone into the case which meant that this was an annoyance not a disaster.